178

No. 10-857

Supreme Court, U.S.
FILED
OCT 28 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA], HELEN DWOJAK, and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DATO
Counsel of Record
HARRY W. R. CHAMBERLAIN II
EFRAT M. COGAN
BUCHALTER NEMER, PC
18400 Von Karman Avenue, Suite 800
Irvine, CA 92612
(949) 760-1121
rdato@buchalter.com

Attorneys for Petitioners County of Orange, Helen Dwojak, and Marcie Vreeken

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A magistrate in a state juvenile dependency proceeding issued an order removing two children from their mother's custody. The mother later agreed to no custody in exchange for dismissal of the dependency proceeding and she lost her bid to reacquire custody in a later family law proceeding. The mother sued a county and two of its social workers for "loss of familial association" under 42 U.S.C. § 1983. A jury found the social workers committed perjury and withheld exculpatory evidence in the dependency proceeding, awarding nearly $5 million in damages, mostly against the county.

1. Despite no history of similar violations, the county was found liable under § 1983 for failing to train its social workers. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris*, 489 U.S. 378, 389-391 (1989). A pattern of violations is usually necessary to show culpability and causation. This Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. *See Canton*, 489 U.S. at 390 n.10. The issue is currently before this Court in *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). Does imposing failure-to-train liability on a social services agency for a single constitutional violation contravene the rigorous culpability and causation standards of *Canton*?

QUESTIONS PRESENTED – Continued

2. The mother "established" liability against the county under *Monell v. Department of Social Services*, 438 U.S. 658 (1978), through responses to requests for admissions generally stating that the social workers' unspecified conduct "complied with" the county's custom or practice. Do such responses to requests for admissions constitute sufficient evidence of an official policy that was the moving force behind a constitutional injury, as required by *Monell*?

3. In *Heck v. Humphrey,* 512 U.S. 477 (1994), this Court held that reversal or vacation of a criminal judgment is necessary in order to demonstrate that the then-defendant (and now section 1983 plaintiff) was directly harmed by the underlying misconduct. In order to satisfy the rigorous culpability and causation standards of *City of Canton*, should the rule in *Heck* also be applied to dependency or family law proceedings?

4. The county raised the issue of the absolute immunity of its social workers in challenging the sufficiency of the complaint, in its summary judgment motion, and in post-trial motions. However, the county did not plead absolute immunity as an affirmative defense in its answer. Under these circumstances, does a governmental entity waive the defense of absolute immunity?

RULE 29.6 STATEMENT

The County of Orange is a municipal corporation duly organized under the laws of the State of California. Both Helen Dwojak and Marcie Vreeken are individuals.

LIST OF PARTIES

Plaintiff and Respondent: Deanna Fogarty-Hardwick

Defendants and Petitioners: The County of Orange, Helen Dwojak, and Marcie Vreeken

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	iii
List of Parties	iv
Index to Appendix	vii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Introduction	4
Statement of the Case	6
A. The Initial Dissolution Proceedings in Family Court	7
B. The Dependency Proceedings in Juvenile Court	8
1. The County Initiates Dependency Proceedings	8
2. Cary Experiences Problems in Receiving Ordered Visitation and Phone Calls	8
3. SSA Files an Amended Petition, Specifically Naming Deanna	9
4. The February 13, 2000 Attempted Visit Between Cary and His Daughters	9
5. The February 15 SSA Visitation and the Dependency Court Hearing Following It	10

TABLE OF CONTENTS – Continued

Page

6. Deanna States That Vreeken Threatened Her 12

7. When Deanna and Cary Discuss Settlement During the Contested Jurisdictional Hearing, the Dependency Court Orders a "730 Evaluation," Prompting a Report From Dr. Rogers That is Critical of Deanna 13

8. After Receiving Dr. Rogers' Report, Deanna Stipulates to Cary's Custody and the Petition is Dismissed 14

C. The Custody Proceedings in Family Court 15

D. The Present Lawsuit in Superior Court 16

1. The Claims Contained in the Operative Complaint and the Court of Appeal's Reversal of the Demurrer Ruling 16

2. Post-Remand Proceedings Before Trial 17

3. The Trial and Post-Trial Proceedings 18

4. The Court of Appeal Affirms the Monetary Judgment in All Material Respects, Reverses the Trial Court's Imposition of a Permanent Injunction, and Denies the County's Petition for Rehearing 20

TABLE OF CONTENTS – Continued

Page

Reasons Why the Petition Should Be Granted ... 22

I This Court Should Grant, Vacate, and Retransfer Pursuant to the Principles to be Addressed in the *Connick* Decision, Because *Monell* Liability Here Was Based on the Conduct of Social Workers in a Single Dependency Proceeding 22

II This Court Should Address Whether Requests for Admissions of the Type at Issue Here May Be Used to Establish *Monell* Liability 27

III This Court Should Decide Whether Civil Rights Plaintiffs Alleging Deprivation of Rights in Family or Dependency Proceedings Should be Required to First Show That They Would Have Prevailed in Those Proceedings 31

IV The California Court of Appeal's Opinion Finding Waiver of Absolute Immunity is Inconsistent With Federal Court Precedents 34

Conclusion..... 36

INDEX TO APPENDIX

Court of Appeal's Opinion .....App. 1

Trial Court Judgment.....App. 51

Order After Hearing (Cal. Family Ct.) .....App. 72

Order Denying Rehearing (Cal. Ct. App.).....App. 92

TABLE OF CONTENTS – Continued

Page

Order Denying Review (Cal. Sup. Ct.).....App. 93

Excerpt of Trial Transcript (Feb. 16, 2007).....App. 94

Excerpt of Trial Transcript (Mar. 1, 2007).....App. 96

Excerpt of Clerk's Transcript (Cal. Juv. Ct. Hearing).....App. 110

Trial Exhibit 40.....App. 132

TABLE OF AUTHORITIES

Page

CASES

Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997).....22, 23, 25, 26, 33

City of Canton v. Harris, 489 U.S. 378 (1989)....*passim*

City of Oklahoma v. Tuttle, 471 U.S. 808 (1985).....23

Clarke v. Upton, 2009 U.S. Dist. Lexis 44045, (E.D. Cal. 2009).....24

Collyer v. Darling, 98 F.3d 211 (6th Cir. 1996).....35

Connick v. Thompson, No. 09-571 (argued Oct. 6, 2010).....4, 22, 26

Cooper v. City of Fargo, 905 F. Supp. 703 (D. N.D. 1995) 28, 29

Cozzo v. Tangipahoa Parish Council-President Government, 279 F.3d 273 (5th Cir. 2002).....35

Heck v. Humphrey, 512 U.S. 477 (1994).....5, 20, 31, 32, 33

Hudson v. City of N. Las Vegas, 2007 U.S. Dist. Lexis 2377 (D. Nev. 2007).....28, 29

Huftile v. LC Miccio-Fonseca, 410 F.3d 1136 (9th Cir. 2005) 32

Ireland v. Tunis, 907 F.Supp. 1088 (E.D. Mich. 1995) 34

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).....23

Monell v. Department of Social Services, 436 U.S. 658 (1978).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 23

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 35

Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991) 35

Ramirez v. County of Los Angeles, 397 F.Supp.2d 1208 (C.D. Cal. 2005) 32

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 23

Stachan v. City of Federal Heights, 837 F.Supp. 1086 (D. Colo. 1993) 28, 30

Taylor v. Sullivan, 980 F.Supp. 697 (S.D.N.Y. 1997), *affd.*, 166 F.3d 1201 (2d Cir. 1998) 32

Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996) 23

Van de Kamp v. Goldstein, ___ U.S. ___, 129 S. Ct. 855 (2009) 34

STATUTES

28 U.S.C. Section 1257 1

42 U.S.C. Section 1983 ..... *passim*

California Welfare and Institutions Code Section 300 ..... 2, 8, 9

RULES AND REGULATIONS

Fed.R.Civ.Proc. Rule 36(a) 28

The County of Orange (California), Helen Dwojak, and Marcie Vreeken respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three.

OPINIONS BELOW

In *Fogarty-Hardwick v. County of Orange*, the California Court of Appeal, Fourth Appellate District Division Three, affirmed a judgment against the County of Orange (in the amount of $4,521,570), Helen Dwojak (in the amount of $278,100) and Marcie Vreeken (in the amount of $119,186). The opinion is reprinted at App. 1. The Court of Appeal denied a petition for rehearing. App. 92. The California Supreme Court denied review on September 29, 2010. App. 93.

JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1257. This petition has been filed within 90 days after the California Supreme Court denied review.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

California Welfare and Institutions Code Section 300 provides, in pertinent part:

> Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:
>
> (a) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian

which indicate the child is at risk of serious physical harm. . . .

(b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . .

(c) The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. . . .

(d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the [California] Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian

has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

INTRODUCTION

In *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010), this Court will decide whether imposing "failure-to-train" liability on a governmental entity for a single constitutional violation contravenes the culpability and causation standards of *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This case presents the same issue but involves a social services agency rather than a prosecutor's office. The jury here awarded nearly $5 million in damages for "loss of familial association" based on allegations that two social workers lied and suppressed evidence in a California juvenile dependency proceeding, causing a state magistrate to order removal of plaintiff's two children from her custody. Aside from responses to generic requests for admissions (a separate issue discussed below), the only evidence of a governmental "policy" stemmed from the conduct occurring in this case. As to this issue, petitioners request that this Court grant certiorari, vacate the judgment, and retransfer this matter to the California Court of Appeal for reconsideration in light of the principles to be set forth in *Connick*.

This case presents other compelling issues. The California Court of Appeal found liability against the

County of Orange based on responses to generic requests for admissions, which asked if the social workers' actions complied with County policy (without specifying the conduct). Although there is a split of authority, the majority of federal courts have held that such "admissions" do not establish a governmental policy sufficient to find liability under the *Monell* doctrine. This Court should resolve the divergence in the case law.

Petitioners also argued below that Deanna Fogarty-Hardwick's failure to retain custody in either juvenile court or family court prevented her from obtaining recovery for "loss of familial association" in civil court. The California Court of Appeal rejected this argument, holding that *Heck v. Humphrey,* 512 U.S. 477 (1994) only applied where the underlying proceedings were criminal in nature. This Court should decide whether extending *Heck* to juvenile or family court proceedings furthers the rigorous culpability and causation standards of *City of Canton* and *Monell.*

Finally, the California Court of Appeal held that petitioners waived their defense of absolute immunity by failing to plead it as an affirmative defense in their answer. However, lower federal courts have consistently held that there is no waiver if the defense is raised in other ways, such as in a challenge to the pleadings or in a summary judgment motion. Petitioners raised the defense in that manner here. This Court should address whether state courts can find waiver of federal immunities in civil rights cases.

All of these issues demonstrate the haphazard and inconsistent application of federal law in state tribunals. Certiorari is necessary in order to address these issues.

STATEMENT OF THE CASE

Deanna Fogarty-Hardwick ("Deanna") sued the County of Orange and a number of its social workers, including defendants Vreeken and Dwojak, alleging that defendants violated her rights to familial association in connection with the institution and handling of dependency proceedings over her daughters under California's juvenile dependency law.[1]

Deanna alleged that Dwojak and Vreeken, along with another social worker (Elaine Wilkins), lied, fabricated evidence, and withheld exculpatory evidence from the dependency court, allegedly causing her to lose custody of her daughters. At trial the jury found liability against Dwojak and Vreeken for their conduct and found that the County was also liable under *Monell v. Department of Social Services* (1978) 436 U.S. 658. App. 56-57, 60-67.[2]

---

[1] Although the California Court of Appeal referred to plaintiff as "Fogarty-Hardwick," petitioners will use her first name because of the multiple references to her former spouse, Cary. No disrespect is intended.

[2] The jury found no liability against social worker Wilkins. App. 58-59.

Deanna alleges that she was denied custody of her children as a result of judicial deception perpetrated by the defendants. However, prior to filing her lawsuit, Deanna never challenged any of the dependency or custody orders issued in the dependency or family law proceedings, including the family court order awarding custody to her former spouse. The history of those actions, as pertinent to her claims, is as follows:

A. The Initial Dissolution Proceedings in Family Court.

Deanna and Cary Hardwick filed for divorce in 1995 and obtained a status-only judgment of dissolution in early 1998. The couple has two daughters, K. and P. K. is autistic. Prior to November 1999, Deanna had primary custody of the children, with Cary having custody three weekends a month. Shortly after Cary remarried, Dr. Marjorie Mitchell became the children's therapist, primarily to assist them in adjusting to their father's recent marriage. App. 3-4.

In late 1999, Cary moved for full custody of the children, claiming that he was having difficulty coparenting with Deanna. At about the same time, Deanna brought K. to see Dr. Mitchell to report that Cary had sexually abused K. Although Dr. Mitchell was suspicious about the timing of the allegation, she was under a mandatory duty to report the allegations, and she did so. App. 3-4.

B. The Dependency Proceedings in Juvenile Court.

1. The County Initiates Dependency Proceedings.

As a result of Dr. Mitchell's report, the County's Social Services Agency (SSA) filed a juvenile dependency petition pursuant to California Welfare and Institutions Code Section 300, subdivision (b) (risk of serious physical harm or illness to the child as a result of a failure to supervise or protect) and subdivision (d) (child has been a victim of, or is at risk of, sexual abuse). Another social worker (Rachel Davis, not a named defendant) was initially assigned to the case. She conducted an investigation and prepared reports as well as participated in filing the initial and first amended dependency petition. App. 4. Deanna never claimed any inaccuracies in Davis' reports, and further testified that she trusted Davis and "there was no reason not to. . . . [S]he was wonderful." App. 95.

At the initial detention hearing, the juvenile court ordered the children to remain in Deanna's custody with Cary having monitored visitation. App. 4.

2. Cary Experiences Problems in Receiving Ordered Visitation and Phone Calls.

Once SSA became involved, Cary was limited to monitored visits each week. There were problems with Cary's visitation (i.e., the children missed visitations, and Cary did not get his allotted phone calls),

and disputes arose as to who was responsible for those problems. Among other things, the daughters expressed unwillingness to visit with their father, and K. made allegations against one of the monitors – Hector Delgadillo – which caused him to be replaced for a time. App. 4.

3. SSA Files an Amended Petition, Specifically Naming Deanna.

In February 2000, SSA filed a first amended dependency petition, adding a count under California Welfare and Institutions Code Section 300, subdivision (c) (child suffering, or at serious risk of suffering, serious emotional distress). This new count named Deanna and alleged (among other things) that the custody battle had placed K. in the middle of the parents' deteriorating relationship and caused her emotional distress, and Deanna exposed K. to her hypervigilant attitude toward Cary and his new wife, which caused K. to suffer emotional distress. App. 4-5.

4. The February 13, 2000 Attempted Visit Between Cary and His Daughters.

Cary attempted to visit with his daughters using Delgadillo as the private monitor on February 13. Deanna drove the children to the site, but both girls refused to visit, and Deanna drove them away. App. 5.

5. The February 15 SSA Visitation and the Dependency Court Hearing Following It.

Two days later (on February 15), the girls had another monitored visit with Cary. This visit with Cary went smoothly. Once the visit concluded, K. and P. became visibly upset. The jury found (as Deanna alleged) that Vreeken had spoken with both girls, telling them they had to visit with their father, and if they did not, the judge was going to put them in a home. Vreeken repeated these statements to Deanna. App. 5.

The dependency court held a hearing two days later, and reviewed visitation issues in light of past problems and warnings he had issued. The court referenced off-the-record discussions it had with counsel and with Vreeken. Wilkins and Vreeken told the dependency court that Deanna had told the girls their father was trying to take them away from her. The social workers also stated that Deanna had been responsible for turning K. against Delgadillo, the visitation monitor. App. 6.

Deanna, through counsel, denied these things, but the dependency court concluded that Deanna was "using these children." App. 6. The court's statements are quoted in their entirety:

> I have been doing this since I think about 1990. That's how long I have been on the bench. I don't think I have ever had to order Social Services to remove a child from a home before. *This is remarkable because we*

were just here. I warned the parents what would happen.

And it's interesting because whether or not the mother knew of the court's decision regarding whether or not Mr. Delgadeo [*sic*] was an appropriate monitor, it's interesting to note to the court that once the mother had made a decision as to whether she liked Mr. Delgadeo [*sic*] or not, her children decided they didn't like [him] and I note that the things the children say when they are vilifying the folks that mother doesn't like are very conclusionary and there is no real detail as to what, exactly, it is. That's the problem.

In this particular case when they are talking about Mr. Delgadeo [*sic*], [K.] says that [he] threatened her, and then when he is asked what was said, he said, "Well, come on. I will go with you." Now that tells me that you have got a child who has been told that somebody has threatened him without knowing what threatening means.

Without regard to whether or not the conduct by the father had taken place or not, this is just not acceptable. *You are using these children, ma'am. There is no question in my mind, based on what I have got right now before me, that that's what's going on.*

We are going to have a trial on the 28th. And it may well be that you are right and you didn't say these things, but from the evidence I have before me right now, it looks like you are. And just as at the detention

> hearing, I have got to be looking out for the welfare of these children. I have got to do that today, too, based on what I have before me right now. I think I have no other choice but to do that.
>
> So I am going to find that it's of immediate and urgent necessity for the protection of these children that they be removed from your home. And I find that to leave these children in your home at this time would create a substantial risk of emotional and psychological detriment to these children. I am ordering Social Services Agency to remove these children from the home.

(Italics added.) App. 124-126.

The dependency court ordered that the children be placed at a children's home. The children were later removed to foster care, where they remained until May 2000. App. 7.

6. Deanna States That Vreeken Threatened Her.

After a March 1, 2000 trial setting conference, Deanna and Vreeken engaged in a "highly charged" conversation concerning the claims made by the social workers about Deanna's conduct. According to Deanna, Vreeken stated that if Deanna did not "submit" to her will, she would "never see [her] kids again." And while both girls, and especially K., exhibited significant emotional distress in their placement, which was reported to SSA by their therapist, that

information (according to the opinion) was not conveyed to the court by the social workers. App. 7-8.[3]

7. When Deanna and Cary Discuss Settlement During the Contested Jurisdictional Hearing, the Dependency Court Orders a "730 Evaluation," Prompting a Report From Dr. Rogers That is Critical of Deanna.

The contested jurisdictional hearing began in March. By May, nearing the end of testimony, the parties discussed a means of resolving the dependency proceedings through a "301 Agreement," under which Cary and Deanna would agree to counseling without court supervision. The court ordered an evaluation from Dr. Rogers to assist in understanding whether Cary had molested K. and whether she and P. were suffering emotional damage due to their parents' conduct. App. 8.

In her report, Dr. Rogers discussed her belief that K.'s accusation of sexual abuse had been "too coincidental" to be credible, and did not appear "spontaneous." Dr. Rogers did not conclude that Deanna had made any conscious effort to encourage K. to make a false claim of sexual abuse, but believed that due to

---

[3] A court report addendum drafted by Vreeken and filed in juvenile court on April 4, 2000, established that the information was indeed conveyed. App. 134. The California Court of Appeal ignored this evidence.

K.'s autism, she was less able to differentiate between her own experiences and what she had been told. Thus, Deanna's own fears and preoccupation with the issue had unduly influenced K.'s perceptions. Dr. Rogers also found that both parents had inflicted some degree of emotional abuse on the children, by virtue of their difficult relationship, but that Cary was more able to differentiate between his own needs and those of his children, and was thus better at shielding the children from his emotional issues. Dr. Rogers concluded that while Deanna's visits with the children should remain monitored, Cary should be allowed unrestricted contact. App. 8-9.[4]

8. After Receiving Dr. Rogers' Report, Deanna Stipulates to Cary's Custody and the Petition is Dismissed.

The parties agreed to resolve the dependency proceedings once they had received Dr. Rogers' report. Deanna stipulated to an agreement under which the juvenile court dismissed the amended petition and authorized informal supervision pursuant to the parties' agreement. The children would be released into the temporary custody of Cary and Deanna would be restricted to monitored visitation, which

---

[4] The paragraph summarizing Dr. Rogers' report is set forth almost verbatim from the California Court of Appeal's opinion. Unfortunately, the County was prohibited from referring to that report at trial, and thus, the jury did not have the benefit of these facts.

could be increased and liberalized as she complied with the requirements of the plan. The children were immediately taken out of foster care and placed with Cary and the matter was transferred back to family court. Deana testified that she believed she had no choice other than to agree in order get her children out of foster care. App. 9.

C. The Custody Proceedings in Family Court.

In December 2001, and after protracted proceedings, the family court granted legal and physical custody to Cary and set a visitation schedule. App. 10. In a detailed order, the family court addressed the sexual abuse accusations against Cary. The court found that many of Deanna's declarations contained inconsistent information concerning her work history, income and expenses; the court further found it did not believe her statements that she could not afford a monitor to visit with her children because, during the same period, she claims she paid over $100,000 to attorneys. App. 85. The court also found that K.'s story (related to Dr. Mitchell and summarized above) verified Cary's contention that Deanna programmed the child to accuse her father of sexual abuse. However, since the court believed Deanna thought the accusation to be true (whether or not she coached it), it declined to award sanctions in the form of attorneys' fees. App. 10, 86.

In its custody order, the court cautioned Deanna as follows: "This court is trying to consider the past,

be aware of the present, and make orders for the future of these children that will allow them to have a relationship with both parents. *If the mother is unable or refuses to forget the past this order will not succeed and litigation will continue causing the children to suffer greatly.*" (Italics added.) App. 82-83.

Deanna regained shared custody in 2006. App. 10.

D. The Present Lawsuit in Superior Court.

1. The Claims Contained in the Operative Complaint and the Court of Appeal's Reversal of the Demurrer Ruling.

Deanna filed the present lawsuit in February 2001, alleging (among other things) a cause of action under 42 U.S.C. Section 1983 for violations of her constitutional right to familial association. According to Deanna, the County's social workers had relied upon "intentional[ly] false statements," fabricated evidence, and "perjury" as part of a successful effort to convince the juvenile court to remove her daughters from her custody and place them in foster care. She also asserted the County had a policy of "deliberate indifference" to the rights of parents in her situation and, as a result of that policy, the County failed to supervise, control or direct the conduct of its social workers. App. 10-11.

The County challenged Deanna's complaint, relying (among other things) on collateral estoppel and absolute immunity. After the trial court dismissed the

complaint without leave to amend, the California Court of Appeal determined the ruling was correct only as to the state law tort claims, concluding the Section 1983 claim was properly alleged, and reversed the judgment with directions to overrule the demurrer with respect to that claim. The Court of Appeal left it to the trial court, on remand, "to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion." App. 11-12.

2. Post-Remand Proceedings Before Trial.

In its answer to the second amended complaint, the County pleaded the affirmative defense of qualified immunity, but did not plead the defense of absolute immunity.

The parties then conducted discovery. Deanna sent requests for admissions to all three defendants, including the following: (1) "Admit that you were at all times carrying out the policies of defendant Orange County Social Services Agency in your handling of the matter of *Hardwick* . . . "; and (2) "Admit that you were at all times carrying out the customs, meaning the permanent, widespread, or well settled practices of defendant Orange County Social Services Agency in your handling of the *Hardwick* matter." Defendants admitted these requests. App. 97-99.

Deanna took the deposition of the person most knowledgeable on the County's policies and procedures (Susan Holl), and Holl's deposition was read at

trial. She testified that social workers are not to provide perjured testimony and that they may be held personally liable if they fabricate evidence. Holl also testified that she had no knowledge of a social worker ever being disciplined for failing to offer exculpatory evidence. App. 103-107.

The County moved for summary judgment, arguing that (1) all of the wrongful conduct alleged against the social workers qualified as "quasi-prosecutorial," and was thus protected by absolute immunity; and (2) the alleged conduct fell within the absolute testimonial privilege. Deanna opposed the motion, arguing the defense of absolute immunity had been waived by the County's failure to plead it, and the court denied the motion in October 2006. The trial court also denied the County's later motion to amend its answer. App. 12-13.

3. The Trial and Post-Trial Proceedings.

The jury found that both Vreeken and Dwojak "intentionally violate[d] the plaintiff's right to familial association or right to privacy"; that they did so "while acting or purporting to act in the performance of their official duties"; and that their conduct was a substantial factor in causing Deanna's harm. The jury found that Vreeken caused $117,386 in damages and Dwojak caused $273,900 in damages. App. 13.

The jury concluded that Vreeken and Dwojak's conduct occurred "as a result of the official policy or custom of the County of Orange," and in connection

with that verdict, the jury concluded Deanna's damages were $2,260,785. The jury also found that the County was "deliberately indifferent to the need to train and/or supervise its employees adequately," and that failure was both the cause of Deanna's loss of familial association and a substantial factor in causing harm to her. In connection with that special verdict, the jury concluded that Deanna's damages totaled $2,260,785. App. 14.

The jury returned a special verdict concluding that "regardless of the award of damages in [the other verdict forms] . . . , the total damages suffered by" Deanna were $411,456 in past economic losses; $36,400 in future economic losses; $2,810,000 in past non-economic losses; and $1,655,010 in future non-economic losses. These "total damage" numbers add up to $4,912,866 – the same total reached by adding up the separate damage amounts assessed against each defendant. Finally, the jury found that both Vreeken and Dwojak acted with "malice, oppression or fraud." The jury assessed punitive damages against Vreeken in the amount of $1,800, and against Dwojak in the amount of $4,200. (*Id.* at p. 11.) The trial court denied the County's motion for judgment notwithstanding the verdict and for a new trial. App. 14-15.

4. The Court of Appeal Affirms the Monetary Judgment in All Material Respects, Reverses the Trial Court's Imposition of a Permanent Injunction, and Denies the County's Petition for Rehearing.

Following standard and supplemental briefing, the California Court of Appeal affirmed the monetary judgment in its entirety. The holdings included:

- The County waived its argument concerning the lack of substantial evidence to support a County policy but, in any event, the responses to the requests for admissions constituted substantial evidence. App. 36.

- The rule based on *Heck v. Humphrey*, 512 U.S. 477 (1994), requiring a reversal or vacation of a criminal judgment to demonstrate the plaintiff was directly harmed by the underlying misconduct could not be applied to dependency or family law proceedings. App. 27-28.

- The County waived the defense of absolute immunity by failing to plead it in its answer. App. 30-32.

The Court of Appeal reversed the grant of a permanent injunction, holding that the trial court had no authority to issue an injunction prohibiting the County from including allegations in a juvenile dependency petition against any parent or guardian without reasonable and articulable evidence that the child has been abused, neglected or abandoned *by the*

accused parent or guardian, or is in immediate danger of abuse, neglect or abandonment *by that parent* because the injunction is inconsistent with the statute governing dependency jurisdiction. The Court of Appeal also found that the trial court was also without authority to issue an order prohibiting a parent or guardian from signing an "Agency Temporary Agreement" for the release of confidential information absent reasonable suspicion for the same reasons. The injunction also improperly purported to control the conduct of social services in future cases before the dependency court. App. 48.

The Court of Appeal denied the County's petition for rehearing (App. 92), which was largely based on the requests for admission issue.

The California Supreme Court denied the County's petition for review. App. 93. The grounds for the petition included whether responses for requests for admission alone may establish a policy and thus *Monell* liability and whether a governmental entity waives absolute immunity by failing to include the defense in its answer.

REASONS WHY THE PETITION SHOULD BE GRANTED

I

This Court Should Grant, Vacate, and Retransfer Pursuant to the Principles to be Addressed in the *Connick* Decision, Because *Monell* Liability Here Was Based on the Conduct of Social Workers in a Single Dependency Proceeding.

A municipality is not liable under Section 1983 simply because it employs a tortfeasor. Instead, a plaintiff must show that the municipality has an unconstitutional policy or custom that directly causes a constitutional injury. *Monell*, 436 U.S. at 690-694 (the legislative history of Section 1983 "compels the conclusion that Congress did not intend municipalities to be held liable *unless* action pursuant to official municipal policy of some nature caused a constitutional tort"); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997).

In enacting Section 1983, Congress chose its language carefully to ensure that liability could not be imposed vicariously "solely on the basis of the existence of an employer-employee relationship with a tortfeasor" and in the absence of proof that it was policy, *and not* merely employee misfeasance, that was the cause of a plaintiff's injury. *Monell*, 436 U.S. at 692.

Consistent with these principals, "a single instance of unconstitutional activity is insufficient to

establish a policy under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved." *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-824 (1985); *Ramirez v. County of Los Angeles,* 397 F.Supp.2d 1208, 1228 (C.D. Cal. 2005).

Here, Deanna did not show the existence of a written policy to prove fault and causation. *See Bryan County,* 520 U.S. at 403-407; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-484 (1986). Nor did she establish that an official policymaker affirmatively ordered unconstitutional action. *Ibid.*; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, she was required to show either (1) a widespread practice that is so permanent and well-settled as to constitute a custom or usage that has the force of law, and that such practice was the cause of injury (*Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), or (2) an official with final policymaking authority ratified a subordinate's decision and the basis for it. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

If a party proceeds on a theory that municipal inaction – i.e., a failure to train – was the cause of a constitutional injury, he or she must show that the failure to train was the product of a "deliberate" or "conscious" choice by a municipality or by its policymakers. *City of Canton v. Harris,* 489 U.S. 378, 389 (1989). Hence, a plaintiff must show that the

policymaker made a deliberate choice to approve a subordinate's wrongful conduct, in full awareness of the nature and extent of that conduct. *City of Canton*, 489 U.S. at 388-389 & n.7. Even gross negligence in failing to discover or head off that conduct is insufficient. *Id.* at 390-391.

In the present case, Deanna did not offer evidence that the County had prior notice that conduct like that she alleged here had occurred previously in any other dependency case.[5] She offered no evidence that similar charges had been made (let alone sustained) against Dwojak or Vreeken. Thus, to the extent the California Court of Appeal's affirmance *sub silentio* relies on a failure to train, it completely negates any distinction between municipal and vicarious liability.

At the time of the social workers' alleged actions, no law required counties to train their social workers to disclose exculpatory evidence. No case had held that such a duty to disclose was even applicable in dependency proceedings. *See Clarke v. Upton*, 2009 U.S. Dist. Lexis 44045, *53-54 (E.D. Cal. 2009) (noting lack of authority). This suggests that failure-to-train liability for a failure to disclose exculpatory

---

[5] Deanna did show a pattern of including certain allegations in dependency petitions, which persuaded the trial court to grant injunctive relief. However, the Court of Appeal reversed the injunction because the trial court lacked authority to issue it. In any event, this particular "pattern" of conduct did not harm Deanna and was not the basis for the imposition of damages.

evidence could not be actionable against a county, at least for a failure prior to 2009. Hence, a failure to train on this issue could not give rise to "single-incident" liability in a dependency case.

As to lying or fabricating evidence, lay persons daily confront the obligation to tell the truth. They sign forms (including tax returns, residential home disclosure forms, declarations and affidavits) under penalty of perjury. Social workers submit each of their reports signed under penalty of perjury. What training could or would assist in ensuring that social workers tell or write the truth? There is nothing about the circumstances of this case that would bring it within the narrow exception for single instance liability identified in *City of Canton*.

Liability based on failure to train requires a pattern of employee wrongdoing. *Bryan County*, 520 U.S. at 409. A municipality's negligence in training or supervision is not enough to show the requisite pattern and deliberate indifference, nor will it show that the inadequate training or supervision caused any injury.

In *Bryan County*, this Court suggested that there might be a "narrow range" of circumstances in which failure to adequately train or supervise might be triggered by a single violation. *Bryan County*, 520 U.S. at 409. This suggestion, in turn, arose from language in *City of Canton* providing an example involving the use of deadly force (from which there can be no recovery). In that example, when a municipality arms

its officers with firearms, and fails to train them on the constitutional limits of when to use deadly force, the risk of fatalities, and grievous injuries in connection with use of firearms can be deemed so obvious, that the failure to train them can be considered deliberate indifference to constitutional rights. *City of Canton*, 489 U.S. at 390 n.10.

Even so, this Court still mandated that the municipality have some advance notice before municipal liability could be imposed in order to avoid weakening or abating the stringent fault and causation requirements necessary to find municipal liability under *Monell* in single instance failure-to-warn cases. Otherwise, as Justice O'Connor noted in both *City of Canton* and *Bryan County*, the failure-to-train theory would engulf *Monell* and impose liability without municipal fault or causation. *City of Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part); *Bryan County*, 520 U.S. at 409.

This issue is presently before the Court in *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010). As to this issue, petitioners request that the Court grant certiorari, vacate the judgment, and retransfer the matter to the California Court of Appeal for further consideration in light of the principles to be set forth in the *Connick* opinion.

II

This Court Should Address Whether Requests for Admissions of the Type at Issue Here May Be Used to Establish *Monell* Liability.

Other than evidence derived solely from this case, the only other showing of a governmental policy was derived from petitioners' responses to requests for admissions.[6] These responses admitted that the social workers in general carried out the policies, customs or practices of the County in their handling of the dependency proceeding. App. 97-99. The requests did not specifically identify the conduct (i.e., perjury and withholding evidence); rather, Deanna purportedly made that showing at trial and then claimed petitioners "admitted" that all of their conduct was pursuant to County policy.

The County did not have any formal policy condoning such improper acts; rather, social workers were to report information accurately and subject to the penalties of perjury. App. 104. The County knew of no other cases in which a social worker had been found to have committed acts such as those charged

---

[6] Deanna tried, and failed, to establish a County policy through the testimony of Larry Leaman, director of the County's Department of Child Support Services. App. 100-103. No evidence was presented that Leaman implemented an unconstitutional policy, or ratified unconstitutional actions, and the California Court of Appeal found none. It was presumably for this reason that Deanna dismissed Leaman as a defendant before trial.

here. App. 106. Apart from the generic responses to the requests for admissions, the evidence did not establish the existence of an affirmative policy or a widespread pattern of improper conduct that rose to the level of a custom or usage.

Pursuant to the teachings of *Monell* and its progeny, simple discovery responses that an employee was acting within custom or policy without evidence that the response was made with knowledge that the employees' actions were in fact unconstitutional *should constitute* nothing more than an irrelevant opinion. Two cases – *Hudson v. City of N. Las Vegas*, 2007 U.S. Dist. Lexis 2377 (D. Nev. 2007) and *Cooper v. City of Fargo,* 905 F. Supp. 703 (D. N.D. 1995) – have so found in light of this Court's precedents. One other court – *Stachan v. City of Federal Heights,* 837 F.Supp. 1086, 1092 (D. Colo. 1993) – held to the contrary, without considering the foregoing precedents and mechanically applying Fed.R.Civ.Proc. Rule 36(a).

In *Hudson*, the city admitted in a police misconduct case "that the actions of [defendant officers] . . . with respect to [their] encounter with plaintiff John Hudson were completely and entirely within the policies, practices, procedures and custom of the City of North Las Vegas." *Hudson,* 2007 U.S. Dist. Lexis 2377 at *22-23. The district court held this "admission" did not establish a policy sufficient under *Monell*:

> Although the City admitted the officer's conduct was within its policies and practices,

> such an admission simply shows that the city sanctioned its officers' conduct ***because it believes the officers acted appropriately and constitutionally***, i.e., within its policies and practices. ***Evidence demonstrating a municipality's opinion regarding the constitutionality of its employees' conduct is irrelevant with respect to whether a municipality promulgated a policy causing its employees to act unconstitutionally***.

Id. at *23 (emphasis added).

Cooper v. City of Fargo, supra, 905 F. Supp. 703, reached the same conclusion. In *Cooper*, plaintiffs alleged they were illegally arrested for picketing in a residential neighborhood. The City admitted that its arresting officer (Niemann) "acted pursuant to the City's official policies, customs, practices and procedures" and "pursuant to his training and instruction as a City of Fargo police officer" when he arrested plaintiffs. *Id.* at 708. Plaintiffs argued that these admissions constituted "endorsement or ratification of Neimann's unconstitutional conduct, automatically giving rise to municipal liability" under *Monell*. The district court rejected this argument: "The court views the admissions . . . only as an acknowledgement that the defendant police officers acted pursuant to existing policies and training, none of which specifically addressed the enforcement of the anti-picketing ordinance. . . . ***The admissions are not the equivalent of an affirmative decision, cast in the form of a policy statement, to ignore training***

deficiencies or to completely omit training about the proper enforcement of the residential anti-picketing ordinance." *Ibid.* (emphasis added).

By contrast, and without much analysis, *Stachan v. City of Federal Heights, supra,* 837 F.Supp. 1086, held that a request for admission that an officer's entry into a home and shooting of plaintiff was in conformance with city policy could establish a policy for purposes of *Monell*, the only question being whether the policy was unconstitutional. *Id.* at 1092.

This Court has not directly addressed the issue in prior rulings, although at least some courts have correctly interpreted *Monell* and its progeny as requiring that such admissions be viewed with skepticism. In light of the lower courts' inconsistent treatment of the issue, this Court should clarify (a) the place for requests for admissions of this type in establishing *Monell* liability, and (b) the level of specificity needed to treat such admissions as binding, so as to prevent the lower courts from eviscerating the necessary distinction between municipal and vicarious liability.

III

This Court Should Decide Whether Civil Rights Plaintiffs Alleging Deprivation of Rights in Family or Dependency Proceedings Should be Required to First Show That They Would Have Prevailed in Those Proceedings.

The California Court of Appeal rejected petitioners' contention, based on *Heck v. Humphrey,* 512 U.S. 477 (1994), that a rule developed in criminal cases requiring a reversal or vacation of the criminal judgment to demonstrate the plaintiff was directly harmed by the underlying misconduct should be applied to dependency or family law proceedings. In *Heck*, this Court held:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C. Section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. [Section] 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under [42 U.S.C. Section 1983].

512 U.S. at 486-487.

The California Court of Appeal distinguished *Heck* "for the obvious reason that a dependency case

is not a criminal action." App. 27. The Court of Appeal also held that "the numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for 'expungement' of a dependency dispositional order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention), we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding." App. 27.

This Court should decide whether these so-called "distinctions" pass muster under federal civil rights law. Petitioners submit that they cannot. Under *Heck*'s teachings, state prisoners challenging convictions on constitutional grounds must not only exhaust their habeas remedies, but they must exhaust their state appellate remedies – remedies that are applicable to both civil and criminal litigants. Thus, *Heck* teaches that if a prisoner has not reversed his conviction either by direct appeal or writ of habeas corpus (the latter only because of the criminal nature of the proceeding), a civil damages claim is barred. *Ramirez v. County of Los Angeles*, 397 F.Supp.2d 1208, 1221-1222 (C.D. Cal. 2005); *Taylor v. Sullivan*, 980 F.Supp. 697, 705 (S.D.N.Y. 1997), *affd.*, 166 F.3d 1201 (2d Cir. 1998).

Moreover, those federal courts that have considered the issue have extended *Heck* beyond criminal proceedings to, for example, civil commitment proceedings. *See e.g., Huftile v. LC Miccio-Fonseca*, 410

F.3d 1136, 1138-1140 (9th Cir. 2005). The favorable termination rule crafted by this Court in *Heck* is one that derives from civil law (by analogy from malicious prosecution) and that is applied in civil cases. There is no reason in law or policy that civil cases seeking damages for violations of constitutional rights based on judgments and orders procured by false testimony should be exempted from a favorable termination rule that applies in the criminal context.

Deanna never sought appellate review of the challenged dependency court's determinations. Rather, she stipulated that Cary would have temporary custody in the dependency court. The family court then awarded full custody to Cary. Again, Deanna never appealed this determination.

Moreover, the family court order demonstrates that there was ample cause – unconnected with anything that happened in the dependency court – not to award custody to Deanna. Thus, the family court's award of custody to Cary acknowledges that there was cause – unrelated to anything the social workers did – not to leave the children in Deanna's custody. Even in the absence of the dependency proceedings, the family law court would have awarded custody to Cary, and Deanna could not demonstrate that the result (her loss of custody) would have been any different. This then defeats any ability to meet the heightened causation standard required under *Monell, City of Canton,* and *Bryan County*.

If state courts are allowed to reject federal rules and precedents that apply to Section 1983 damages action, or to apply federal precedents inconsistently with the federal court's interpretation of Section 1983, this can only serve to effectuate an incoherent and haphazard application of federal law. In this case, it did away with any requirement that Deanna meet the stringent culpability and causation requirements for a *Monell* claim.

IV

The California Court of Appeal's Opinion Finding Waiver of Absolute Immunity is Inconsistent With Federal Court Precedents.

Absolute immunity is a critical defense for governmental entities in civil rights cases. It can protect prosecutors, police officers, and social workers from lawsuits arising from the performance of their duties on behalf of the public. *See Van de Kamp v. Goldstein,* ___ U.S. ___, ___, 129 S. Ct. 855, 860 (2009).

The California Court of Appeal held that the County's failure to plead absolute immunity in its answer operated as a waiver. Numerous federal cases have held that, regardless of whether the defense is absolute or qualified immunity (*Ireland v. Tunis,* 907 F.Supp. 1088, 1095 (E.D. Mich. 1995)), the critical inquiry is whether the defense is *raised,* not whether it is *pleaded*:

"Defendants must raise the . . . immunity defense in order to benefit from the substantial shield it

affords. [Citation.] Defendants may do this in their answer, or in a motion to dismiss or a motion for summary judgment. [Citation.] Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial. [Citations.] But in order to benefit from the defense Defendants must raise it." *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991); *accord*, *Cozzo v. Tangipahoa Parish Council-President Government,* 279 F.3d 273, 283 (5th Cir. 2002); *Collyer v. Darling,* 98 F.3d 211, 222 (6th Cir. 1996).

Here, the County raised the issue of absolute immunity in the Court of Appeal (twice), in its initial challenge to the pleadings, in its motion for summary judgment, and its motion for judgment notwithstanding the verdict. Moreover, due to the multiple times it was raised, Deanna was not prejudiced by any failure to separately plead the defense.

"The conclusion that there has been a waiver of immunity will not be lightly inferred." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959). This court should decide whether a governmental entity waives the immunity defense under these circumstances.

CONCLUSION

Governmental entities face enormous challenges in their efforts to provide public services with ever-decreasing resources. The California Court of Appeal's opinion finds municipal liability based solely on one case or answers to generic requests for admission, renders prior judicial proceedings meaningless, and finds waiver of absolute immunity even though the defense was raised. This Court should grant certiorari to address any or all of these vital issues.

Respectfully submitted,

BUCHALTER NEMER, PC

ROBERT M. DATO
HARRY W. R. CHAMBERLAIN II
EFRAT M. COGAN

Attorneys for Petitioners
County of Orange,
Helen Dwojak, and Marcie Vreeken

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G039045 (Super. Ct. No. 01CC02379) OPINION (Filed Jun. 14, 2010)

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed in part and remanded with directions.

Buchalter Nemer, Robert M. Dato and Efrat M. Cogan; Beam, Brobeck, West, Borges & Rosa, Byron J. Beam and Glen A. Stebens, for Defendants and Appellants.

Law Offices of Shawn A. McMillan, Shawn A. McMillan, Sondra Sutherland and Jody Hausman; Law Offices of Donnie R. Cox, Donnie R. Cox and Dennis B. Atchley, for Plaintiff and Respondent.

The County of Orange, along with two of its social workers, Marcie Vreeken and Helen Dwojak (collectively the County), appeals from a substantial monetary judgment in favor of Deanna Fogarty-Hardwick for damages caused by the County's violation of her federal civil rights.[1] Specifically, the County was found liable based upon improper conduct by the social workers, which caused Fogarty-Hardwick to lose custody of her two daughters in a dependency proceeding.[2]

---

[1] Section 1 of the Civil Rights Act of 1871, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." (42 U.S.C. § 1983, rev. stat. § 1979.)

[2] The County has filed two requests for judicial notice. The first was filed in conjunction with its opening brief on appeal, and asks us to judicially notice portions of the records in the underlying dependency court and family court proceedings. The County contends the documents provide evidentiary support for arguments advanced in the opening brief. The second request was filed in conjunction with the County's reply brief, and asks us to judicially notice a different part of the record in the dependency case, which it contends would refute evidence relied

(Continued on following page)

Although the County makes numerous arguments challenging liability in this case, none of them is persuasive. Similarly, we reject the County's challenge to the amount of damages awarded, and to the trial court's use of a "multiplier" in connection with its award of attorney fees to Fogarty-Hardwick.

However, we do conclude the trial court erred by awarding injunctive relief against the County, and remand the case to the trial court with directions to strike that injunctive relief from the judgment. In all other respects, the judgment is affirmed.

FACTS

Fogarty-Hardwick and her former husband separated in 1995, and obtained a status-only judgment of dissolution in early 1998. The couple has two daughters, K. and P. K. is autistic. Initially, Fogarty-Hardwick had primary custody of the girls, with her former husband having custody three weekends per month. However, in late 1999, the husband made a motion in the family court for full custody, claiming he had difficulty coparenting with Fogarty-Hardwick.

In November of 1999, Fogarty-Hardwick brought K. to the therapist who had been engaged to help the

---

upon by Fogarty-Hardwick in her respondent's brief. None of these portions of the dependency case record was in evidence at trial; nor does the County contend it asked the trial court to take judicial notice of them. We consequently deny both requests for judicial notice.

girls "adjust[ ] to their father's recent remarriage." They reported to the therapist that Fogarty-Hardwick's former husband had sexually abused K. The therapist was under a mandatory duty to report such allegations to authorities, and she did so.

As a result of the therapist's report, the Orange County Social Services Agency (SSA) filed a dependency petition alleging the two daughters were at risk of serious physical harm or illness, and sexual abuse. At the initial detention hearing on November 19, 1999, the court ordered the children remain in the custody of Fogarty-Hardwick, with her former husband allowed monitored visitation. Although another social worker was initially assigned to the case, Vreeken succeeded her in fairly short order. Dwojak was Vreeken's supervisor, and also had some direct involvement in the handling of the case.

Unfortunately, there were problems with the former husband's visitation, and disputes arose as to who was responsible for those problems. Among other things, the daughters were uncooperative, and apparently expressed unwillingness to visit with their father. Additionally, K. made allegations of misconduct against one of the monitors, and he was replaced for a period of time.

On February 8, 2000, SSA filed an amended petition, adding allegations that K. had been placed in the middle of her parents' deteriorating relationship; that Fogarty-Hardwick had made derogatory comments to her, causing her to suffer "anxious

attachment" to Fogarty-Hardwick; and that Fogarty-Hardwick's "hypervigilant attitude" toward her former husband and his new wife had caused K. to suffer emotional distress.

On February 13, 2000, Fogarty-Hardwick brought her daughters to a monitored visit with their father. The daughters resisted, and although the monitor tried to coax them, he was unsuccessful, and Fogarty-Hardwick ultimately took them home. Two days later, Fogarty-Hardwick brought the girls for another monitored visit at the SSA office. The visit itself went well, but in its wake, Vreeken spoke with both girls, telling them they were *required* to visit with their father, and "if they didn't visit with their father, the judge was going to put them in a home." This caused both girls to become frightened and start to cry. P. ran to get her mother, leaving K. alone with Vreeken. When Vreeken brought K. to join P. and Fogarty-Hardwick, K.'s face was discolored and her eyes were swollen.

Vreeken informed Fogarty-Hardwick (apparently outside of the children's presence) that she had told the children they would be placed in a home if they didn't visit with their father, which upset Fogarty-Hardwick to such a degree that she vomited. She begged Vreeken for guidance as to what more she could do, because she didn't want to lose her daughters. Vreeken responded with "you'd better call your attorney."

On February 17, 2000, two days after that disastrous meeting, the court held a hearing on the allegations of the amended petition. In connection with the hearing, the court had an off-the-record discussion with counsel, and also a discussion with Vreeken. Vreeken made false allegations against Fogarty-Hardwick, including assertions that she had caused her daughters to skip a mandatory visit with their father, and that she had told the children that their father was trying to take them away from her. In reality, it was Vreeken, and not Fogarty-Hardwick, who had made inappropriate comments to the children, including the threat that if they did not visit with their father, they would be put "in a home." The social workers also alleged Fogarty-Hardwick had been responsible for turning K. against the visitation monitor.

Although Fogarty-Hardwick denied all these things, the court nonetheless concluded, based upon the evidence of Fogarty-Hardwick's conduct as reported by the social workers, that she was "using these children." The court emphasized "[t]here is no question in my mind, based on what I have got right now before me, that that's what's going on." The court acknowledged that Fogarty-Hardwick denied engaging in the conduct the social workers had accused her of, and noted: "it may well be that you are right and you didn't say these things, but from the evidence I have before me right now, it looks like you [did.] And just as at the detention hearing, I have got to be looking out for the welfare of these children. I have

got to do that today, too, based on what I have before me right now. . . . I think I have no other choice but to do that. [¶] So I am going to find that it's of immediate and urgent necessity for the protection of these children that they be removed from your home. . . ." The children were taken into SSA custody that same day.

The social workers then filed a second-amended petition on February 23, 2000, in which they reiterated, as official allegations, the false claims they had made to the court at the February 17 hearing.

After the girls were removed from Fogarty-Hardwick's custody, they were placed in the Orangewood Children's Home, where they remained for more than a month. Fogarty-Hardwick was restricted to supervised visitation. Although the court authorized SSA to return the girls to Fogarty-Hardwick's custody on February 23, 2000, the social workers refused to do so. Instead, on March 21, 2000, the girls were moved to foster care, where they remained until May of 2000.

Meanwhile, on March 1, 2000, after a trial setting conference, Vreeken engaged in a highly charged conversation with Fogarty-Hardwick concerning the false claims made by the social workers about Fogarty-Hardwick's conduct. Vreeken got angry, and threatened that if Fogarty-Hardwick did not "submit" to her will, she would "never see [her] kids again." And while both girls, and especially K., exhibited significant emotional distress in their placement,

which was reported to SSA by their therapist, that information was not conveyed to the court by the social workers. Instead, Vreeken falsely claimed, under oath in testimony before the court, that the children were doing well.

Both social workers also demeaned Fogarty-Hardwick to others involved in the case, portraying her as a spoiled beauty queen who was born with all the advantages and was used to getting her way.

In May of 2000, the dependency court ordered an evaluation of the children by a licensed family therapist, in an effort to determine the truth of K.'s assertion that her father had molested her, and the extent to which the parents' conduct was otherwise causing the children to suffer emotional distress. In her report, the therapist concluded that neither parent would knowingly abuse the children, and neither posed any significant risk of physical harm to the children. She believed K.'s accusation of sexual abuse had been "too coincidental" to be credible, and did not appear "spontaneous." The therapist did not conclude that Fogarty-Hardwick had made any conscious effort to encourage K. to make a false claim of sexual abuse, but believed that due to K.'s autism, she was less able to differentiate between her own experiences and what she had been told. Thus, Fogarty-Hardwick's own fears and preoccupation with the issue had unduly influenced K.'s perceptions.

The therapist also found that both parents had inflicted some degree of emotional abuse on the

children, by virtue of their difficult relationship, but that the father was more able to differentiate between his own needs and those of his children, and was thus better at shielding the children from his emotional issues.

The therapist concluded that while Fogarty-Hardwick's visits with the children should remain monitored, her former husband should be allowed unrestricted contact.

Ultimately, on May 19, 2000, Fogarty-Hardwick signed a voluntary case plan, which provided the dependency case would be dismissed, and the children released from foster care, upon certain conditions. Specifically, the children would be released into the temporary custody of their father, and Fogarty-Hardwick would be restricted to monitored visitation, which could be increased, and the terms liberalized, as she complied with the requirements of the plan.

Fogarty-Hardwick believed that her acquiescence in the plan was necessary to get her children out of foster care, and felt that she had no choice but to agree, given the difficulties suffered by the children while in foster care. Once the plan was signed, the dependency case was dismissed, and the custody issue was transferred back to the family court.

Despite Fogarty-Hardwick's complaints, and the concerns expressed by others about the handling of this dependency case, SSA did not investigate the situation or consider assigning different social workers to the matter. Neither of the social workers

involved was disciplined. Instead, Vreeken was promoted to supervisor in 2001.

The custody proceedings in family court were protracted, and the court did not enter a final custody order until December of 2001. In that order, it awarded legal and physical custody of the children to Fogarty-Hardwick's former husband. However, as the County acknowledges, while the family court concluded that no sexual abuse had occurred, it "believed Deanna thought the [child abuse] accusation to be true . . . ," and thus made no determination she had acted in bad faith in connection with the dependency proceedings.

Fogarty-Hardwick finally regained shared custody of her daughters in June of 2006. She had filed this lawsuit in February of 2001, alleging tort causes of action based upon state law, as well as causes of action under federal law, which sought damages based upon alleged violations of her constitutional right to familial association. The basis of these causes of action was Fogarty-Hardwick's allegation that the County's social workers had relied upon "intentional[ly] false statements," fabricated evidence, and "perjury" as part of a successful effort to convince the juvenile court to remove her daughters from her custody and place them in foster care.

Fogarty-Hardwick also alleged the social workers deliberately withheld information from the court concerning the emotional detriment suffered by her daughters while in foster placement, and thereby

convinced the court to extend the children's placement. Fogarty-Hardwick also asserted the County had a policy of "deliberate indifference" to the rights of parents in her situation, and as a result of that policy, the County failed to supervise, control or direct the conduct of its social workers.

The County challenged several iterations of Fogarty-Hardwick's complaint, and relied upon collateral estoppel and absolute immunity under state law as the bases for its demurrer to her second amended complaint. Although the trial court sustained that demurrer in its entirety without leave to amend, this court determined the ruling was correct only as to the state law tort claims. Rather than relying upon the arguments made by the trial court in sustaining the demurrer, we concluded Fogarty-Hardwick had failed to state a cause of action under state law. However, we also concluded the causes of action based upon the alleged violation of Fogarty-Hardwick's federal civil rights had been properly alleged, and reversed the judgment with directions to overrule the demurrer with respect to those claims. (*Fogarty-Hardwick v. County of Orange* (Mar. 29, 2004, G030302) [nonpub. opn.].)

In that prior opinion, we noted that while the County had relied upon absolute immunity in its original appellate briefs, it had omitted any reference to the defense in a supplemental brief filed in response to this court's invitation for further briefing with respect to the federal civil rights claims. We suggested the omission reflected the County's

recognition that a then-recent decision of the Ninth Circuit Court of Appeals, *Miller v. Gammie* (9th Cir. 2002) 335 F. 3d. 889, "holds that social workers have absolute immunity only for the quasi-prosecutorial decision to institute dependency proceedings. Beyond that, the burden is on a social worker defendant to show that other functions he or she performed are similar to conduct accorded absolute prosecutorial immunity at common law." (*Fogarty-Hardwick v. County of Orange, supra,* G030302, p. 14.) We then noted that the claims asserted by Fogarty-Hardwick included conduct occurring after the initiation of the dependency case, and thus that "the demurrer to the federal claims cannot be sustained on this ground." (*Id.* at p. 15.) We specifically left it to the trial court, on remand, "to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion." (*Ibid.*)

In its answer to the second amended complaint, the County pleaded the affirmative defense of qualified immunity, but did not plead the defense of absolute immunity. The parties then conducted discovery.

In April of 2006, the County moved for summary judgment, arguing (among other things) that (1) all of the wrongful conduct alleged against the social workers qualified as "quasi-prosecutorial," and was thus protected by absolute immunity; and (2) the alleged conduct fell within the absolute testimonial privilege. Deanna opposed the motion, arguing the defense of absolute immunity had been waived by the County's

failure to plead it, and the court denied the motion in October of 2006.

In December of 2006, less than a month before trial was scheduled to commence, the County filed a noticed motion for leave to amend its answer to include the defense of "absolute, judicial, prosecutorial and testimony privilege of federal law." In doing so, the County specifically requested the court to exercise its discretion to allow the late amendment "in the furtherance of justice." Fogarty-Hardwick opposed the attempt, arguing she would be prejudiced by the late addition of an absolute immunity defense. The trial court agreed, and denied the motion.

At the completion of trial, the jury returned special verdicts in favor of Fogarty-Hardwick. The jury found that both Vreeken and Dwojak "intentionally violate[d] the plaintiff's right to familial association or right to privacy"; that they did so "while acting or purporting to act in the performance of their official duties"; and that their conduct was a substantial factor in causing harm to Fogarty-Hardwick. In connection with the misconduct of Vreeken, the jury answered the question "What are Deanna Fogarty-Hardwick's damages?" with a total of $117,386, including past and future economic loss, and past and future non-economic loss. In connection with the misconduct of Dwojak, the jury answered the same question by concluding Fogarty-Hardwick's "damages" totaled $273,900 including past and future economic loss, and past and future non-economic loss.

In a separate special verdict form the jury concluded that Vreeken and Dwojak's conduct occurred "as a result of the official policy or custom of the County of Orange," and in connection with that verdict, the jury concluded Fogarty-Hardwick's damages were $2,260,785, including past and future economic loss, and past and future non-economic loss.

The jury also concluded that the County was "deliberately indifferent to the need to train and/or supervise its employees adequately," and that failure was both the cause of Fogarty-Hardwick's loss of familial association and a substantial factor in causing harm to her. In connection with that special verdict, the jury concluded Fogarty-Hardwick's damages totaled $2,260,785, including past and future economic loss, and past and future non-economic loss.

With respect to damages specifically, the jury returned a special verdict concluding that "regardless of the award of damages in [the other verdict forms] . . . , the total damages suffered by" Fogarty-Hardwick were $411,456 in past economic losses; $36,400 in future economic losses; $2,810,000 in past non-economic losses; and $1,655,010 in future non-economic losses. These "total damage" numbers add up to $4,912,866 – the same total reached by adding up the separate damage amounts assessed against each defendant (including *both* damage amounts of $2,260,785 assessed against the County.)

Finally, the jury found that both Vreeken and Dwojak acted with "malice, oppression or fraud." The

jury assessed punitive damages against Vreeken in the amount of $1,800, and against Dwojak in the amount of $4,200.

The court entered judgment in favor of Fogarty-Hardwick and against: (1) Vreeken in the amount of $119,186; Dwojak in the amount of $278,100; and the County of Orange in the amount of $4,521,570. The court also issued an injunction prohibiting SSA from (1) "including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent"; or (2) requiring a parent or guardian to sign its "'Agency-Parent Temporary Agreement'" or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

After the entry of judgment, the County moved for a judgment notwithstanding the verdict, arguing that defendants were entitled to absolute immunity under federal law. The County acknowledged the court had earlier refused to allow this defense, but

asserted the issue had been properly raised and was supported by the evidence adduced at trial. The County also moved for a new trial, arguing the court had abused its discretion in denying its pretrial motion to add the defense of absolute immunity to its answer. The court denied both motions, and, in doing so, reiterated its conclusion the County had waived the defense of absolute immunity.

I

The County first argues Fogarty-Hardwick's claims are barred in their entirety, because this case represented an attempt to "relitigate" the issue of custody, which was already "fully litigated" in both the dependency and family law cases.

We disagree. The County's argument ignores the fact that custody orders are, by their nature, sui generis. A court's analysis of what custody arrangement would be in the best interests of the children is based upon an evaluation of facts and circumstances as they exist *at the time the order is made,* and such orders – even if deemed "permanent" – may be altered and modified based upon a significant change in circumstances affecting the court's evaluation of what custody arrangement is currently in the child's best interests. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256; Fam. Code, §§ 3011, 3020, 3022, 3087.) Thus, a custody order establishes nothing more than what arrangement is in the children's best interests, in

light of the circumstances found to exist on the date it issued.

Consequently, the fact a family court ultimately ordered that Fogarty-Hardwick's former husband would retain custody of her two daughters in December of 2001 – a year and a half after he had been given temporary custody (and Fogarty-Hardwick only limited visitation) as a result of the dependency case – *in no way* establishes that the same order would also have been made back in February of 2000, when Fogarty-Hardwick herself still enjoyed primary custody.

Clearly, the dependency case itself was an enormous change in circumstances. Even aside from the change in custody that directly resulted from it, we are certain the court in the family law case would have presumed the dependency case had been handled appropriately; that the juvenile court's decision to remove the girls from Fogarty-Hardwick's custody and place them in foster care had been based upon truthful and sufficient evidence, and that the stipulated termination of that dependency proceeding reflected both parents' voluntary acquiescence in the conditions imposed upon them.

None of those very significant presumptions would have played any part of a custody determination made by the family court in February of 2000. Consequently, there is simply no basis for assuming the family court would have taken custody away from

Fogarty-Hardwick, and awarded it to her husband, had it been asked to rule on the issue at that time.

Likewise, the stipulated termination of the dependency case, which awarded temporary custody of the girls to Fogarty-Hardwick's former husband, is an insufficient basis to support a finding of collateral estoppel. Even more so than the later custody order, the stipulated termination of the dependency case was very much *the product* of the particular circumstances and events leading up to it – and specifically of the social workers' misconduct in that case.

Had the social workers not wrongfully caused the girls to be taken from Fogarty-Hardwick's custody and placed in foster care, there is nothing in the record suggesting she would have voluntarily agreed to relinquish custody. To the contrary, Fogarty-Hardwick testified she did so *only* because she felt coerced by the social workers, and believed she had no other choice if she wanted to free her daughters from foster care. Because the outcome of the dependency case was irretrievably prejudiced by the very misconduct which is at the core of this case, it cannot be cited as evidence of what would have happened in the absence of that misconduct. We cannot engage in the kind of "boot-strapping" that would allow the County to rely upon the outcome of the tainted dependency case as a basis to avoid liability for the very acts which tainted it.

Buesa v. City of Los Angeles (2009) 177 Cal.App.4th 1537, cited by the County in a letter filed

after briefing was completed, does not alter our collateral estoppel analysis. According to the County, *Buesa* stands for the proposition that "perjury" can never form the basis of a collateral attack on a judgment. As applied here, the County's argument seems to be that the specific dispositional order depriving Fogarty-Hardwick of custody in the dependency case is presumed to be "correct," and cannot be collaterally attacked on the basis it was obtained through perjured testimony. *Buesa* is distinguishable.

In *Buesa,* police officers filed an action for damages against the City of Los Angeles, based upon the wrongful termination of their employment. The court dismissed the action, citing collateral estoppel based upon an earlier writ of mandate action in which the officers unsuccessfully sought a court order requiring the city to reinstate them. The "central issue" in the mandate action had been the officers' contention that the disciplinary action which resulted in their terminations was barred by the statute of limitations contained in the Public Safety Officers Procedural Bill of Rights Act, commonly referred to as POBRA. (Gov. Code, § 3300 et seq.) (*Id.* at p. 1548.) However, the City successfully contended that limitations period had been tolled for a sufficient period to render the disciplinary action timely.

In the subsequent damages action, the officers alleged the court's calculation of the tolling period in the mandate action was based upon the perjured testimony of a city witness, and sought damages (rather than reinstatement of their employment) as a

result of the City's violation of their rights under POBRA. Thus, in *Buesa,* the officers had simply filed two successive actions – the first seeking equitable relief, and the second seeking damages – based upon the *identical assertion* that the city had previously violated their rights when it initiated disciplinary action in violation of the POBRA statute of limitations. The officers' assertion of perjury in the mandate proceeding was nothing more than a justification for allowing them to *relitigate* the same statute of limitations issue in the damages case, so it amounted to an assertion the prior mandate judgment should be disregarded on the basis of *intrinsic* fraud, which has never been an acceptable basis for attacking a final judgment. (*Pico v. Cohn* (1891) 91 Cal. 129; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.)

In this case, by contrast, Fogarty-Hardwick did not initiate successive proceedings, each seeking relief against the same party, based upon the same prior acts of misconduct and the same injury. Stated simply, her injuries *arose out of* the proceeding in which the perjury occurred, i.e., the corrupted dependency proceeding, and she had no ability to assert any claim based upon those injuries within *that proceeding.* Collateral estoppel will not be applied unless "the party against whom the earlier decision is asserted had a 'full and fair' opportunity to litigate the issue." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.) And it will not be applied "if injustice would result or if the public

interest requires that relitigation not be foreclosed." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888.)

More fundamentally, the County's attempt to give collateral estoppel effect to the dispositional order in a dependency case ignores the special nature of such proceedings, which may include successive "final" orders which are not really intended to be *final* in the manner of an order issued in other cases.

Dependency cases are, by their nature, fluid, and specifically intended to address the present and future interests and needs of the affected children. As explained in *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, all juvenile court orders made during the pendency of the case, even those deemed "final" and no longer subject to appeal, are considered inherently changeable pursuant to Welfare and Institutions Code section 388, and are thus not entitled to the same res judicata or collateral estoppel effect that attach to other judgments. "In light of the ongoing nature of the proceedings and the express statutory authority permitting modification, principles of res judicata and collateral estoppel do not bar a modification of a [final] dispositional order. . . ." (*Id.* at p. 879.)

Moreover, the fluid nature of dependency proceedings, and the paramount need to protect the well-being of the children, require these proceedings to

move very quickly in response to alleged changes in circumstances, especially with respect to any assertion a child is currently at risk of harm. "Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency, largely to serve the dependent child's best interests. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152.) 'Of the many private and public concerns which collide in a dependency proceeding, time is among the most important.' (*Ibid.*)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 635.)

Unfortunately, a rule requiring the rigid application of collateral estoppel to the intentionally fluid interim decision-making of a dependency court, would inevitably encourage parties to litigate more aggressively, and even to launch collateral challenges to those decisions during the pendency of the proceeding. In this case specifically, the County is arguing that Fogarty-Hardwick was bound by the court's February 17, 2000 order, removing her children from her custody, because she never had that ruling overturned. But given the nature of Fogarty-Hardwick's challenge to that ruling – that it was based upon the social workers' falsified evidence – her only avenue for doing so would have been to file a writ of habeas corpus; such a claim would not be cognizable in an ordinary appeal. Thus, what the County is proposing is a rule which requires a parent to engage in collateral attacks on the validity of prior dependency orders (and on the integrity of the social workers),

during the dependency case itself, if they wish to preserve any civil claims.

We conclude that such a requirement would be inconsistent with the special nature of dependency proceedings and would interfere with the interests intended to be served in those proceedings. The better policy is to encourage all participants in a dependency action to maintain their focus *on the children,* and to work together as much as possible to quickly address *their* needs on a going-forward basis. To the extent *that focus* requires a parent to directly challenge the actions or motivations of a social worker, then such a challenge would be appropriate. But a requirement that such a challenge be fully litigated *in the dependency proceeding,* merely to preserve the parent's right to maintain a future damages action, would not be.[3] (See *In re Claudia E., supra,* 163 Cal.App.4th at p. 637 [characterizing the habeas corpus remedy as "a time-consuming process that is inimical to the expedient processing of cases and one

---

[3] And of course, the natural tendency of a parent who wishes to maintain (or regain) custody of the children would be to curry favor with the social workers, not alienate them. In this case, even after the relationship between Fogarty-Hardwick and Vreeken had broken down, Fogarty-Hardwick continued to seek guidance from Vreeken, and to try to satisfy her concerns relating to the underlying issues. That spirit of cooperation – even in a flawed relationship – is to be encouraged, and would be undermined by the initiation of collateral litigation which questioned the social worker's professionalism and integrity.

which most likely will be impractical in the crowded dependency system."].)

In *People v. Percifull* (1992) 9 Cal.App.4th 1457, the appellate court relied upon the special nature and purposes of a dependency case in denying collateral estoppel effect to a dependency court's judgment exonerating a parent of a charge he had committed an act which also constituted the felony of child cruelty. The court noted that while a conviction of the parent on that felony charge would be "inconsistent" with the judgment of the juvenile court, according collateral estoppel effect to that judgment would be inappropriate considering the extent to which "the two proceedings serve different public interests and purposes. . . ." (*Id.* at p. 1461.)

We conclude a similar analysis is proper here. The goal of the dependency case was to protect the children, and the court's need to act quickly to fulfill that goal would have been undermined by a rule essentially requiring Fogarty-Hardwick to pursue any claim for perjury or falsification of evidence she might wish to bring against the social workers prior to the conclusion of that proceeding.

II

The County also argues the judgment must be reversed because – while it grudgingly admits Fogarty-Hardwick provided the jury with sufficient evidence to demonstrate the social workers committed egregious acts of misconduct in the dependency

case,[4] – it also contends the circumstances of this case demonstrate, as a matter of law, that the misconduct did not *cause* Fogarty-Hardwick to lose custody of her children in the dependency case.

The County first contends that events occurring after the children were removed from Fogarty-Hardwick's custody in the dependency case, including the stipulated termination of that dependency case, in which the children were released to the custody of Fogarty-Hardwick's former husband, and the family court's ultimate award of custody to the former husband – demonstrate Fogarty-Hardwick was destined to have lost custody in any event.

We find the contention, which amounts to a restatement of the collateral estoppel argument, unpersuasive. As we have already explained, the outcome of the dependency case, as well as the later award of permanent custody to Fogarty-Hardwick's former husband in 2001, were both profoundly influenced by the dependency court's initial decision to remove the children from Fogarty-Hardwick's custody; and that order was, in turn, caused by the misconduct of the social workers. There is no compelling reason to conclude that, in the absence of the

---

[4] As the County concedes, "[Fogarty-Hardwick] demonstrated (if the testimony is to be believed) that in this one instance, social workers lied and fabricated evidence in connection with the dependency proceedings relating to [her] children."

misconduct, those subsequent custody orders would have been the same.[5]

Second, the County relies upon civil rights claims arising out of criminal cases, and argues that a rule developed therein which requires a reversal or vacation of the criminal judgment itself to demonstrate the plaintiff was directly harmed by the underlying misconduct, should be applied to dependency proceedings as well.

The contention is based upon *Heck v. Humphrey* (1994) 512 U.S. 477, in which the Supreme Court held "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C. section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal,

---

[5] Based upon the same analysis, we also reject the County's related assertion that Fogarty-Hardwick's claim for damages was "cut off" as of the date she signed the voluntary case plan which provided for termination of the dependency case and an award of temporary custody to her former husband. There was substantial evidence supporting the inference Fogarty-Hardwick would never have agreed to such an arrangement in the absence of the social worker's misconduct, and that her acquiescence was anything but "voluntary." Similarly, the family court's subsequent award of permanent custody to the husband did not preclude Fogarty-Hardwick's claim for damages past that time. As we have explained, that order must have been significantly affected by the events and outcome of the dependency case; it would thus be more properly construed as evidence of her *continuing damages*.

expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. [section] 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under [42 U.S.C. section 1983]." (*Id.* at pp. 486-487.)

But as the Supreme Court explained in *Heck*, its conclusion was based upon "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments. . . ." (*Heck v. Humphrey, supra*, 512 U.S. at p. 486.) And of course, that principle is not applicable here, for the obvious reason that a dependency case is not a criminal action. Moreover, the numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for "expungement" of a dependency dispositional order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention),[6] we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding. We therefore

---

[6] As a general rule, release of the detained individual would render a request for habeas corpus relief moot. (*In re Stinnette* (1979) 94 Cal.App.3d 800, 803.)

decline to extend this rule applicable to criminal convictions and sentences to the challenged ruling in the underlying dependency case.

Finally, the County argues that the oral statements made by the dependency court, explaining its decision to remove Fogarty-Hardwick's children from her custody in February of 2000, demonstrate the decision was not actually motivated by the social workers' lies, but was instead based upon the court's concern that Fogarty-Hardwick "was using her children and thus interfering with visitation."

There are several problems with this assertion as a basis for challenging the jury's finding of causation, not least of which are (1) that the contention effectively asks us to *interpret* the court's comments in a manner which favors the County, which is inconsistent with our obligation to indulge all inferences in favor of the judgment; and (2) that one of the lies told by the social worker was that Fogarty-Hardwick *had caused her daughters to miss a visit with their father,* which would presumably have provided direct support for the court's conclusion she was "interfering with visitation."

But the most significant problem with the County's contention is that it amounts to an attack on the sufficiency of the evidence to support causation – an attack launched without acknowledging the heavy burden imposed on an appellant who does so.

"An appellate court '"must *presume* that the record contains evidence to support every finding of

fact. . . ."' (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887, italics added; see *Brown v. World Church* (1969) 272 Cal.App.2d 684, 690, ['"a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact"'].) It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. (*Brown v. World Church, supra,* 272 Cal.App.2d 684, 690.) This burden is a 'daunting' one. (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient.* [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.' (*Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14-15.)" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Moreover, the appellant's burden to provide a fair summary of the evidence "grows with the complexity of the record." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record before us is quite substantial (including 14 volumes of reporter's transcript, and 11 volumes of clerk's transcript.) And yet the County supports its attack on the

sufficiency of the evidence to support causation with nothing more than a single piece of evidence, which it asks us to *interpret* favorably to it. We find the effort inadequate and the argument unpersuasive.

III

The County next argues its liability to Fogarty-Hardwick is precluded by the defense of absolute immunity. In doing so, however, the County simply addresses the merits of that defense, making the somewhat controversial assertion that it should be applied to all misconduct of a social worker in connection with a dependency court proceeding (but see *Miller v. Gammie, supra,* 335 F.3d. 889 [explaining why qualified immunity is the defense more generally applicable in such cases]; and *Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d. 906, 908 [concluding social workers "are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute."])

However, what the County does not do is acknowledge that the trial court deemed the absolute immunity defense to have been *waived* in the proceedings below (See *Collyer v. Darling* (6th Cir. 1996) 98 F.3d 211, 222 ["Given that the defense of absolute immunity was not affirmatively pleaded or argued . . . and in light of the significant distinctions between

qualified and absolute immunity claims, this defense was affirmatively waived. . . ."].) And having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it.

In particular, the County does not even *mention* in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before trial. We find it quite remarkable that opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal.[7]

"One of the essential rules of appellate law is that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]' (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.)" (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

Here, we are required to begin with the presumption the court ruled correctly when it denied the County leave to add the absolute immunity defense to

---

[7] The County's motion to amend its answer is included in the record, along with Fogarty-Hardwick's opposition. The County admits, in its reply brief, that the motion was denied.

its answer prior to trial. The County having failed to even claim, let alone establish, that ruling amounted to error, we must affirm the trial court's determination the defense of absolute immunity was waived.

IV

The County also contends liability was precluded by the defense of qualified immunity, but its argument seems to be predicated on the idea that Fogarty-Hardwick had to satisfy a distinct burden of proving causation in connection with the defense – apparently a different element of causation than the one she satisfied in connection with her prima facie case – and that she purportedly failed to do so.

Specifically, the County relies on *Ramirez v. County of Los Angeles* (2005) 397 F.Supp.2d 1208, which it contends stands for the proposition that in order to "defeat qualified immunity" in a case where governmental actors falsified information to the court and deceived the court, . . . a plaintiff would have to show "that but for the dishonesty, the challenged action would not have occurred." But Ramirez says no such thing. To the contrary, *Ramirez* addresses a police officer's motion for summary judgment based upon the affirmative defense, and thus necessarily involves only *what the officer must prove* in order to justify such relief.

Significantly, what *Ramirez* ultimately concludes is that a police officer who knowingly falsified evidence in support of a search warrant application, in

circumstances where he should have known the evidence was otherwise insufficient to support the warrant, was not entitled to rely upon qualified immunity as a defense. In doing so, the court quoted the rule set forth in *Branch v. Tunnell* (1991) 937 F.2d. 1382, 1387: "'If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, . . . he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost."

Thus, the *Ramirez* decision simply reflects an understanding that the essence of the federal defense of qualified immunity is the *reasonableness,* or "good faith," of the defendant's conduct. The defense is applicable in situations where defendants establish that their actions, even if harmful to plaintiff's constitutional rights, were nonetheless carried out in good faith. As explained by the Supreme Court, "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo* (1980) 446 U.S. 635 [fn. omitted]. Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' *Wood v. Strickland* (1975) 420 U.S. 308, 322. The subjective component refers to 'permissible intentions.' *Ibid.*

Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. . . .' *Ibid.* (Emphasis added.)" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815, fn. omitted.)

In this case, the jury specifically concluded that Vreeken and Dwojak lied, falsified evidence, and suppressed exculpatory evidence – all of which was material to the dependency court's decision to deprive Fogarty-Hardwick of custody – and that they did so with malice. These findings are clearly sufficient to satisfy the Supreme Court's definition of circumstances in which "qualified immunity would *not* be available."

There was no error in the rejection of qualified immunity in this case.

V

The County also claims, in conclusory fashion, that Fogarty-Hardwick failed to demonstrate "that the County had a policy of condoning perjury in reports or testimony." As the County asserts, such a

failure of proof would preclude any finding of liability against the County itself, since "[i]n order to hold a public entity liable, a plaintiff must show that a public official or employee acted pursuant to an official policy and custom." (*Monell v. Department of Social Services* (1978) 436 U.S. 658.) This amounts to a contention that the judgment against the County was unsupported by substantial evidence.

However, in asserting this claim, the County has once again failed to make any effort to satisfy its burden to summarize the evidence on the point, favorable and unfavorable, and show how and why it is insufficient. Indeed, the County supports its attack on the substantial evidence with nothing more than a bare assertion that Fogarty-Hardwick "did not prove or submit evidence to show a municipal policy that condoned or encouraged lying or fabricating evidence." The assertion is then followed by an intriguing acknowledgment that Fogarty-Hardwick "may point to defendants' requests for admission that the social workers acted pursuant to municipal policy or custom" in support of the contention that such policies existed, but then suggests that this discovery should be construed favorably to the County, in accordance with its own *assumptions* employed in responding. But there is not a single citation to the record contained within this argument, which (including a discussion of legal authorities) occupies less than one and a half pages of the County's opening brief.

Under these circumstances, we have no choice but to conclude the County waived its claim of insufficiency of the evidence to support the existence of a policy. But even if we were to consider the issue on the merits, we would almost certainly have to reject it in any event. In accordance with the usual procedures on appeal we simply could not, as the County requests, indulge inferences *in its favor* based upon what it contends were its unspoken assumptions in responding to discovery. We are obligated to indulge all inferences in favor of the judgment.

Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) "acted pursuant to municipal policy and custom," that admission would be sufficient to sustain the challenged finding.

VI

The County next asserts the trial court erred in granting Fogarty-Hardwick's motion in limine to exclude evidence she "coached or influenced" her children in connection with claims of sexual abuse against their father. The County asserts this motion was based upon the assertion that such evidence was barred by collateral estoppel, and argues the court erred in granting it because the County was neither a party, nor in privity with any party to the prior proceeding relied upon by Fogarty-Hardwick as the basis of the estoppel.

The County correctly states the requirements for application of collateral estoppel. "The doctrine [of collateral estoppel] applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Moreover, we would agree the County was neither a party to, or in privity with, any party to the prior action, which was the marital dissolution action between Fogarty-Hardwick and her former husband.

However, once again the County has crafted an argument without fully acknowledging what *actually occurred* in the trial court below. This time, what the County fails to acknowledge is that collateral estoppel was *not the only basis* for Fogarty-Hardwick's motion to exclude the evidence. She also relied upon a hearsay objection, as well as Evidence Code section 352.[8]

---

[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will

(Continued on following page)

As previously noted, we are obligated to indulge all presumptions in favor of the court's ruling. As a consequence, where the record does not establish the reasoning employed by the court in reaching its decision, we must presume the court based its ruling on whatever argument asserted best supports it.[9] Hence, in order to persuade us the trial court erred in excluding the evidence, the County was required to demonstrate why none of the arguments relied upon by Fogarty-Hardwick was sufficient to support that decision. Because it made no attempt to do so in its opening brief, we presume the ruling was correct.[10]

VII

The County's last attack on the judgment is based on the assertion the, jury's award of damages was excessive, and reflected a disguised award of

---

(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[9] There is nothing in the record before us establishing the court actually relied upon the collateral estoppel theory in its ruling.

[10] The County concedes in its reply brief that Fogarty-Hardwick's motion was grounded on multiple legal arguments. It then argues, for the first time, that (1) the hearsay objection had no merit, and (2) the evidence it sought to rely upon was "not cumulative." The County cannot make these assertions of legal error, for the first time, in a reply brief. But even if we were to consider the points, we would conclude the argument comes up short.

punitive damages against a governmental entity. In its brief, the County simply pointed to the total compensatory damages assessed against all of the defendants, characterized that total as unusually high and disproportionate to Fogarty-Hardwick's alleged damages,[11] and suggested we infer from the "sheer size" of the award "that the jury acted in a punitive fashion."

However, we found that assertion unpersuasive,[12] and found ourselves more troubled by the significant disparities *among* the damage amounts awarded in

---

[11] The disproportionate argument concocted by the County is simply untrue and misleading. The County purported to compare a relatively small *portion* of the economic damages claimed by Fogarty-Hardwick (her medical expenses), against, the entire award – including the entirety of both economic and non-economic damages – made by the jury. But Fogarty-Hardwick's economic damages also included the significant legal expenses she had incurred during the years-long custody fight she was forced to wage after she was improperly deprived of custody in the dependency case. In fact, the total amount of *economic* damages alleged by Fogarty-Hardwick at trial (including both medical and legal expenses) actually exceeded the amount of *economic* damages awarded to her by the jury. In addition to those economic damages, Fogarty-Hardwick also sought compensation for her significant emotional distress, and it was the jury's award of those *non-economic* damages which accounts for the bulk of the overall liability assessed.

[12] Indeed, at oral argument, the County's attorney expressly conceded that $5 million was *not* an unreasonable amount of damages to compensate for the loss of one's children for a period of several years and the concomitant breakage suffered in those relationships.

the various special verdicts relating to each defendant, and by the fact those special verdicts seem to hold each defendant *separately liable* for those different damage awards. To reiterate, the damage amounts contained in the special verdicts against each defendant include two *separate* awards of $2,260,785 in damages against the County (as compared to only $117,000 against Vreeken herself, and $274,000 against Dwojak, Vreeken's supervisor), and those awards add up to the "total" amount of damages the jury determined Fogarty-Hardwick had suffered. There is no overlap in the numbers, and no joint liability imposed for any damages. While the overall amount of the judgment was not a concern, these disparities did seem to raise the specter of a "punishment" levied against the County for the actions of its employees.

Consequently, we ordered the parties to provide us with supplemental briefing to address the following issues:

(1) What evidence in this case, or legal authority, supports the jury's conclusion that the damages suffered by Fogarty-Hardwick in this case were divisible, or that a distinct portion of her damages was caused by each defendant and not the others?

(2) What evidence in this case, or legal authority, supports the jury's conclusion that the County of Orange caused Fogarty-Hardwick to suffer a greater amount of damage than did Vreeken and/or Dwojak themselves?

(3) What evidence in this case would support the conclusion that the "official policies and customs" of the County of Orange, and/or its failure to train or supervise its employees, caused harm to Fogarty-Hardwick which was distinct and separate than the harm caused by the misconduct of Vreeken and Dwojak?

(4) What evidence in this case, or legal authority, supports the jury's conclusion that the "official policies and customs" of the County of Orange caused Fogarty-Hardwick to suffer different damages than those caused by its failure to train or supervise its employees?

In response to each of these questions, the County gave new definition to the word "laconic" – merely stating in conclusory fashion that it is unaware of any legal authority or any evidence which would support the distinct damage awards made by the jury in this case, while making no effort to argue its position or to explain why such distinctions might undermine the validity of the compensatory verdicts.

Fogarty-Hardwick, by contrast, made a significant effort to explain why the damage awards in the special verdicts should be upheld. Among other things, Fogarty-Hardwick suggested she suffered "a series of independently compensable injuries" over the course of the events underlying this case.

Fogarty-Hardwick also asserted that the separate damage awards can be appropriately viewed as an "apportionment of fault" among the defendants,

and argued the jury could have reasonably concluded the County – which both promulgated the misguided policies which gave rise to the misconduct alleged in this case and failed to adequately supervise its employees – had substantially more responsibility for the effects of that misconduct than did the social workers themselves. Fogarty-Hardwick asserts "the jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility," citing *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.)

Fogarty-Hardwick concedes that no apportionment of fault was requested in this case, but argues that the damage amounts assessed against each defendant – which add up to the total amount of damages which the jury expressly found had been inflicted on Fogarty-Hardwick – demonstrate that the jury actually engaged in the apportionment on its own initiative. She further contends that because the legally appropriate outcome would have been to hold all defendants liable, jointly and severally, for the *entire* $4,912,866 compensatory award, defendants were not harmed by the apportionment, and we should thus uphold the verdicts as rendered.

We agree. In *Jackson,* the court first noted that "[w]hen a plaintiff has suffered a single or indivisible injury, the general rule is that 'each tortfeasor is jointly and severally liable for the entire amount of damages.' [Citation.]" (*Jackson v. City of St. Louis* (8th Cir. 2008) 220 F.3d 894, 897.) There is nothing in this case to suggest that a deviation from that

general rule would be appropriate. As all parties conceded at oral argument, the County inflicted harm on Fogarty-Hardwick only through the actions of its employees, the social workers. Because those social workers acted pursuant to the policies put in place by the County, it was proper to hold the County directly liable for the damages caused by their actions – but the measure of those damages was *the same* for both employees and employer. And since the jury explicitly found that the overall amount of those damages was $4,912,866, it would have been appropriate to hold all defendants liable, jointly and severally, for that amount.

The fact the jury apportioned Fogarty-Hardwick's damages among the several defendants, rather than holding each liable for the entire amount, might theoretically be harmful to Fogarty-Hardwick (who is not complaining), but we cannot see how it harmed defendants. And indeed, in its response to Fogarty-Hardwick's supplemental brief on the point, the County makes no assertion it was harmed by apportionment. We consequently affirm the damage awards as stated in the judgment.

VIII

And finally, the County attacks the court's award of $1.6 million in attorney fees, arguing the court erroneously double-counted the complexity of the case when it relied upon that factor both as a basis for assigning a lodestar amount, and as a basis

for applying a multiplier of 2.5 to that amount. The County contends that as a result of this error, we should remand the case to the trial court, "for a proper determination of attorneys' fees."

The contention is supported by a single case citation, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, in which our Supreme Court is quoted as stating "the difficulty of the question involved [is] *usually* already encompassed by the lodestar." Unfortunately, we cannot locate that quote within *Ketchum*.

And other than that somewhat equivocal (and apparently nonexistent) quotation, the County offers no discussion or analysis of the rule it seeks to invoke, either as applied in *Ketchum* or in any subsequent case; nor does it engage in any meaningful analysis of the court's ruling in this case. Thus, the County has completely failed to demonstrate why this case would necessarily run afoul of *Ketchum*. The issue is waived.

IX

The final issue in this case is one we raised on our own motion, and on which we requested the parties provide supplemental briefing. As part of the judgment, the court granted injunctive relief which "permanently" restrains the County, SSA and their employees from (1) "including allegations in a juvenile dependency petition under [Welfare and Institutions Code section] 300 against any parent or guardian of a child without some reasonable and

aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent"; and (2) "requiring a parent or guardian of a child to sign its 'Agency-Parent Temporary Agreement' or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

We requested the parties address the propriety of this injunctive relief, with particular attention to: "(1) whether the injunctive relief imposes obligations on SSA which are actually or potentially inconsistent with those imposed on it by statute; (2) whether and to what extent the trial court in this case has jurisdiction to control the future conduct of SSA in dependency matters filed in the juvenile court; and (3) whether the injunctive relief granted in this case is, as a practical matter, enforceable."

The County responded with a spirited attack on the injunctive relief, arguing it was fatally inconsistent with statutory requirements; the court lacked jurisdiction to impose it; and the order was unenforceable. These assertions are not unexpected; what is surprising is that the County didn't make any of them in its opening brief.

Fogarty-Hardwick defends the injunctive relief as a necessary and appropriate response to the evidence adduced in this case, and argues it represents a proper exercise of the trial court's discretion. We conclude the injunctive relief must be stricken from the judgment.

As Fogarty-Hardwick herself asserts, SSA has only the powers conferred on it by statute, and must comply with the provisions of the Welfare and Institutions Code in its handling of dependency cases. And while a court might properly restrain SSA from acting in a manner which exceeds or is inconsistent with its statutory mandate, it cannot order SSA to do anything which is *different* from that mandate.

In this case, the first injunctive order states SSA is prohibited from including in a dependency petition any "allegations . . . against any parent or guardian of a child without some . . . reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian,* or is in imminent danger of abuse, neglect or abandonment by that parent." Although the language is not a model of clarity, we presume it is intended to prohibit SSA from making jurisdictional allegations against parents like Fogarty-Hardwick, who the initial dependency petition alleged had "failed to protect" her child from sexual abuse by Fogarty-Hardwick's former husband, but who was not alleged to have personally "abused, neglected or abandoned" the child.

However, such a blanket prohibition is inconsistent with the statute governing dependency jurisdiction. Welfare and Institutions Code section 300 specifies the circumstances under which a child may be declared a dependent child, and those circumstances include where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the *failure or inability* of his or her parent or guardian to adequately *supervise or protect* the child *or* the *willful or negligent failure* of the child's parent or guardian to *adequately supervise or protect* the child from the conduct of the custodian with whom the child has been left. . . ." (Welf. & Inst. Code, § 300, subd. (b), italics added.)

Under this provision, it is clear that a parent's mere "failure or inability" to "adequately supervise or protect" the child is distinguished from the parent's "willful or negligent" failure to do so, and that the Legislature intended *either* circumstance would be a sufficient basis for imposing dependency jurisdiction. Were we to allow the first injunctive order in this case to stand, it would impermissibly restrict SSA's ability to rely upon the mere "failure or inability" of a parent (absent any negligence) to protect the child from being harmed by others. We cannot do that. To the extent the statutory standard is considered to be overly broad or too insubstantial a basis for imposing dependency jurisdiction, that complaint is properly directed to the Legislature, and is not a proper subject of injunctive relief.

As for the second injunctive order issued in this case prohibiting SSA from "requiring" a parent or guardian to sign an "Agency-Parent Temporary Agreement" for the release of confidential information absent a "reasonable suspicion" that the parent in question has "abused, neglected or abandoned the child" – the same considerations pertain. As the County points out, Welfare and Institutions Code section 16010, subdivision (f), specifically requires the court, at the initial hearing, to direct "each parent to provide to the child protective agency complete medical, dental, mental health, and educational information, and medical background, of the child *and of the child's mother and the child's biological father if known.*" (Italics added.) The statute imposes this requirement without regard to the perceived culpability of the parent in question. Thus, we cannot uphold an injunctive order which prohibits SSA from requiring parents to sign releases for such mandatory information in cases where it lacks "reasonable suspicion" that the parent has personally "abused, neglected or abandoned the child."

The injunctive orders are also problematic on jurisdictional and enforcement grounds, as well. By their terms, the orders purport to control the conduct of SSA in *future cases* pending before the *dependency* court. As the County points out, once the dependency court establishes jurisdiction over a particular child, "all issues regarding his or her custody shall be heard *by the juvenile court.*" (Welf. & Inst. Code, § 304, italics added.) Thus, there are inherent jurisdictional

complications presented when an ordinary civil court, exercising its jurisdiction in a tort case, purports to impose blanket restrictions on the manner in which *all future dependency cases* can be handled. Moreover, it appears that enforcement of these orders would be impossible. The future conduct to be enjoined will not, and cannot, be monitored by Fogarty-Hardwick, nor can it otherwise be routinely supervised by the court which issued this order, because juvenile dependency matters are required to be kept confidential. (Welf. & Inst. Code, § 827.)[13]

And while Fogarty-Hardwick seeks to characterize the injunctive relief issued in this case as merely a means of assisting SSA in "promulgat[ing] written policies" and "provid[ing] training" on these issues, that is not what the injunctive orders provide. They explicitly impose restrictions on the conduct of SSA in future dependency court cases. That goes far beyond the mere facilitation of internal policymaking or training. The injunctive relief provisions of the judgment are consequently stricken.

However, our decision to strike the injunctive relief from the judgment should not be viewed by the

---

[13] Welfare and Institutions Code section 827, subdivision (a)(1)(L) allows a juvenile case file to be inspected by "A judge, commissioner, or other hearing officer assigned to a family law case with issues concerning custody or visitation, or both, involving the minor," but does not permit any other judicial officer to have access, merely because he purported to issue an injunction which permanently affects all juvenile cases.

County as a sign we view it as insignificant. Quite the contrary is true. The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of defendants' conduct in this case. Stated plainly, the outcome of this case cannot be dismissed as merely the unfortunate product of a runaway jury. The evidence adduced at trial obviously caused both the jury *and the judge* to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was *not an isolated incident*. That conclusion is something the County should be taking *very* seriously.

The judgment is reversed and the case is remanded to the trial court with directions to strike the injunctive relief from the judgment. In all other respects, the judgment is affirmed. Fogarty-Hardwick is to recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK Plaintiffs, v. COUNTY OF ORANGE, MARCIA VREEKEN, ELAINE WILKINS AND HELEN DWOJAK, Defendants.	Case No. 01CC02379 (Case Assigned to Hon. Ronald L. Bauer, Dept. CX103) ~~[PROPOSED]~~ JUDGMENT (Filed May 16, 2007)

This action came on regularly for trial before the jury, with the Court sitting in equity as to Plaintiff's Fourth Cause of Action seeking an injunction, on February 13, 2007 in Department CX103 of the above entitled Court, the honorable Ronald L. Bauer, Judge presiding. Plaintiff Deanna R. Fogarty-Hardwick appeared in person and was represented by and through her counsel of record Shawn A. McMillan, Esq. and Sondra S. Sutherland, Esq. Defendants County of Orange, Marcia Vreeken, Elaine Wilkins, and Helen Dwojak appeared and were represented by Glen Stebens with the law firm of Byron, Beam, Brobeck, Borges, and Rosa, LLP.

A jury of twelve persons was impaneled and sworn to try case. Witnesses were sworn and testified.

After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the case was submitted to the jury with directions to return their verdict on the matters submitted. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was filed with the clerk and entered upon the minutes. True and correct copies of the jury's verdicts are attached hereto as Exhibit A, and are incorporated herein by this reference.

It appearing that by reason of said special verdict: Plaintiff Deanna R. Fogarty-Hardwick is entitled to judgment against defendant The County of Orange in the amount of $4,521,570.00, with interest to accrue thereon as allowed by law; Deanna R. Fogarty-Hardwick is entitled to judgment against defendant Marcia Vreeken in the amount of $119,186.00, which amount includes the jury's award of punitive damages, with interest to accrue thereon as allowed by law; and Deanna R. Fogarty-Hardwick is entitled to judgment against Helen Dwojak in the amount of $278,100.00, which amount includes the jury's award of punitive damages, with interest to accrue thereon as allowed by law.

Defendant Elaine Wilkins is entitled to judgment that plaintiff take nothing from her.

Subsequent to the Jury's return of its verdict, the Court held a further hearing on May 14, 2007, as to

Plaintiff's Fourth Cause of Action for injunctive relief. Shawn A. McMillan, Esq. appeared and argued on behalf of Plaintiff Deanna Fogarty-Hardwick who was also present in court, and Glen Stebens appeared and argued on behalf of defendant County of Orange. The Court having considered all evidence and argument presented finds that all statutory predicates to the exercise of its equitable powers have been met, and that Plaintiff has met her burden of proof in relation to her Fourth Cause of Action seeking injunctive relief. Accordingly, the Court entered an injunction against the County of Orange Social Services Agency, a true and correct copy of which is attached hereto as Exhibit B and is incorporated herein in its entirety by this reference.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That, in accordance with the jury's verdicts, plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant The County of Orange for the sum of $4,521,570.00 with interest thereon at the maximum rate allowed by law; That plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant Marcia Vreeken for the sum of $119,186.00 with interest thereon at the rate of ten percent per annum; That plaintiff Deanna R. Fogarty-Hardwick have judgment against defendant Helen Dwojak for the sum of $278,100.00 with interest thereon at the rate of ten percent per annum;

That defendant Elaine Wilkins shall have judgment against Deanna Fogarty-Hardwick, who shall take nothing from defendant Elaine Wilkins.

IT IS FURTHER ORDERED that Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are hereby permanently enjoined and restrained from including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent.

IT IS FURTHER ORDERED that Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are hereby permanently enjoined and restrained from requiring a parent or guardian of a child to sign its "Agency-Parent Temporary Agreement" or releases of confidential information (e.g., medical, psychological psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent.

The Court reserves jurisdiction to modify or dissolve the injunction as may be required by the interest of justice.

Deanna Fogarty-Hardwick shall recover her costs of suit including reasonable attorney's fees as allowed pursuant to 42 U.S.C. §1988. The Court retains jurisdiction to determine such amounts. Plaintiff is to file her memorandum of costs within the time prescribed by statute. The issue of prevailing party attorney's fees shall be determined by noticed motion.

APPROVED AS TO FORM:

_____
Glen Stebens, Esq.
Counsel for all Defendants Date:

_____ Date:
Robert M. Dato, Esq.
Counsel for Defendants

/s/ Shawn McMillan
Shawn A. McMillan, Esq. Date: 05-14-07
Counsel for Plaintiff

IT IS SO ORDERED /s/ Ronald Bauer
Ronald L. Bauer,
Judge of the
Superior Court

Date: 16 May 2007

EXHIBIT A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #1** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken intentionally violate the plaintiff's right to familial association or right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Marcie Vreeken violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

__10__ Yes __2__ No

3. Was Marie Vreeken's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__9__ Yes __3__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $12,344

b. Future economic loss: $1,092

c. Past noneconomic loss: $69,300

d. Future non-economic loss: $34,650

TOTAL $117,386

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #2** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Elaine Wilkins intentionally violate the plaintiff's right to familial association or right of privacy?

__2__ Yes __10__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Elaine Wilkins violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

____ Yes ____ No

3. Was Elaine Wilkin's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $_____

b. Future economic loss: $_____

c. Past noneconomic loss: $_____

d. Future non-economic loss: $_____

TOTAL $_____

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007
(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #3** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Helen Dwojak intentionally violate the plaintiff's right to familial association or right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Helen Dwojak violate plaintiff's right of familial association or right of privacy while acting or

purporting to act in the performance of her official duties?

__10__ Yes __2__ No

3. Was Helen Dwojak's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $28,802

b. Future economic loss: $2,548

c. Past noneconomic loss: $161,700

d. Future non-economic loss: $80,850

TOTAL $273,900

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #4** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken's, Elaine Wilkins' or Helen Dwojak's conduct violate plaintiff's right of familial association for right of privacy?

__10__ Yes __2__ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the conduct of Marcie Vreeken, Elaine Wilkins or Helen Dwojak occur as a result of the official policy or custom of the County of Orange?

__11__ Yes __1__ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was Marcie Vreeken's, Elaine Wilkins' or Helen Dwojak's conduct a substantial factor in causing harm to Deanna Fogarty-Hardwick?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $185,155

b. Future economic loss: $16,380

c. Past noneconomic loss: ~~$1,039,500~~ 1,289,500

d. Future non-economic loss: ~~$519,750~~ 769,750

TOTAL ~~$1,760,785~~ 2,260,785

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #5** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Was County of Orange's training or supervision inadequate to train and/or supervise its employees to properly handle usual and recurring situations?

10 Yes 2 No

2. Was County of Orange deliberately indifferent to the need to train and/or supervise its employees adequately?

10 Yes 2 No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no

further questions, and have the presiding juror sign and date this form.

3. Was failure to provide proper training and/or supervision the cause of the deprivation of Deanna Fogarty-Hardwick's right of familial association?

__10__ Yes __2__ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was County of Orange's failure to adequately train and/or supervise its employees a substantial factor in causing harm to plaintiff?

__10__ Yes __2__ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are Deanna Fogarty-Hardwick's damages?

a. Past economic loss: $185,155

b. Future economic loss: $16,380

c. Past noneconomic loss: ~~$1,039,500~~ 1,289,500

d. Future non-economic loss: ~~$519,750~~ 769,750

TOTAL ~~$1,760,785~~ 2,260,785

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **VERDICT FORM #6** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

Regardless of the award of damages in verdict form numbers 1-5 what are the total damages suffered by plaintiff Deanna Fogarty-Hardwick in each of these categories?

a. Past economic loss: $411,456

b. Future economic loss: $36,400

c. Past noneconomic loss: $2,810,000

d. Future non-economic loss: $1,655,010

Signed: /s/ Barbara Hodgan Dated: March 23, 2007
Presiding Juror

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiff, v. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, HELEN DWOJAK, Defendants.	CASE NO. 01CC02379 **SPECIAL VERDICT RE: MALICE OPPRESSION OR FRAUD** (Filed Mar. 23, 2007)

We answer the questions submitted to us as follows:

1. Did Marcie Vreeken act with malice, oppression or fraud?

9 Yes 3 No

2. Did Elaine Wilkins act with malice, oppression or fraud?

__1__ Yes __11__ No

3. Did Helen Dwojak act with malice, oppression or fraud?

__9__ Yes __3__ No

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 23, 2007

(When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
COMPLEX CIVIL CENTER

DEANNE FOGARTY-HARDWICK, Plaintiffs, v. COUNTY OF ORANGE, Defendants.	CASE NO. 01CC02379 **VERDICT FORM RE: PUNITIVE DAMAGES** (Filed Mar. 27, 2007)

1. As to defendant Marcie Vreeken, what amount of punitive damages do you award?

$1,800.00

2. As to defendant Helen Dwojak, what amount of punitive damages do you award?

$4,200.00

Signed: /s/ Barbara Hodgan
Presiding Juror

Dated: March 27, 2007

When signed, this verdict form must be delivered to the bailiff.

EXHIBIT B

Sondra S. Sutherland, Esq. (CSB #185374)
LAW OFFICES OF SONDRA S. SUTHERLAND
2440 Bear Rock Glen
Escondido, California 92026
Telephone: (706) 761-1155
Facsimile: (706) 761-1188
E-Mail: sondra@ssslegal.com

Attorneys for Plaintiff,
DEANNA R. FOGARTY-HARDWICK

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF ORANGE,
CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK & ROES 1-5,	)	Case No. 01CC02379 (Case Assigned to Hon. Ronald L. Bauer, Dept. CX103)
Plaintiffs,	)	Date Action Filed : 2/15/01

v.	)	Trial Date : 2/13/07
COUNTY OF ORANGE, et al.,	)	**PERMANENT INJUNCTION**
Defendants.	)	(Filed May 14, 2007)

The court, having considered Plaintiff's request for a permanent injunction, came on for trial in the above-captioned court commencing February 13, 2007. Sondra S. Sutherland, Esq. and Shawn A. McMillan, Esq. appeared on behalf of Plaintiff, Deanna R. Fogarty-Hardwick, and Glen A. Stebens, Esq. appeared on behalf of Defendants, County of Orange Social Services Agency, Marcie Vreeken, Helen Dwojak and Elaine Wilkins. Satisfactory evidence having been presented.

IT IS ORDERED THAT Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are enjoined and restrained from including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent.

IT IS FURTHER ORDERED THAT Defendant County of Orange, Social Services Agency, and its employees, agents and persons acting on its behalf, are enjoined and restrained from requiring a parent

or guardian of a child to sign its "Agency-Parent Temporary Agreement" or releases of confidential records or information (e.g., medical, psychological, psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent.

The Court reserves jurisdiction to modify or dissolve the injunction as may be required by the interests of justice.

Dated: 14 May 2007 /s/ Ronald L. Bauer
Hon. Ronald L. Bauer, Judge
Orange County Superior Court

WALTER D. POSEY
Commissioner of the Superior Court
Department 402
341 South The City Drive,
Orange, California, 92613-6000

Telephone: 935-7923

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

In re the marriage of:	)	CASE NO.
PETITIONER:	)	95 D- 00 48 98
DEANNA HARDWICK	)	ORDER AFTER
	)	HEARING ORDER
AND	)	TO SHOW CAUSE:
RESPONDENT:	)	(Filed Dec. 31, 2001)
CARY HARDWICK	)	

The Court bifurcated the above matter as to custody and visitation from other issues involved in the dissolution of marriage. The Court heard evidence, reviewed expert reports, read the declarations of both parties, their attorneys and the attorney for the minor children, and reviewed all of the exhibits that were received in the litigation of this action.

The court took the above matter under submission on September 18th, 2001 and rules as contained herein. The issues before the court at this time are custody of the two children; time share of the minor children; legal custody of the children; child support, child care and attorney fees for both parties.

CHILD CUSTODY:

> The issue of greatest import for this court is the question of custody. It is clear that the California legislature has given direction to the trial courts in California Family Law Code §3020(b) which states:
>
> "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interests of the child. . . ."

This court must make the order which best serves this public purpose, however, clearly, the entire scheme underlying custody decrees is that primary consideration must be given to the welfare of the children. In this case these parents have been unable to work together to resolve the issues of the time that the children should have with each parent, Each of them now present themselves to the court indicating that they are good parents. This court defines a "good parent" as one who can meet the various needs of the children involved by thinking of the children first and following the law.

Effective January 1st 1998 the above statute was amended to add that when the court is determining

the child's best interest its main concern should be the health, safety, and welfare of the child concerned.

Family Code 3040(a) directs the court to grant custody in the following order of preference according to the best interests of the children:

> "(1) To both parents jointly or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the non-custodial parent, consistent with Section 3011 and 3020, and shall not prefer a parent as custodian because of that parent's sex."

Family Code Section 3040(b) allows the court the widest discretion to choose a parenting plan that is in the best interest of the children.

This court desires to follow the law, and seeks the key area to rely upon in making the decision. This court wants to follow what is clearly the law of California (in having a frequent and continuing contact) but must chose to do so by looking to the best interests of the children involved in the specific situation.

In making the determination which has to be made, this court has attempted to hear all evidence presented, read all of the expert reports for both parties, observe the witnesses, their demeanor, attitude, candor, and lack of candor.

See: *Board of Education vs. Jack M* (1977) 19 Cal.3d 697.

As to the minor children in this case; to wit: Kendall Hardwick DOB: 9-19-1990; age 11 years and Preslie Hardwick DOB: 9-9-1993; age 8 years, it is ordered that legal and physical custody be granted to the Respondent, father. The primary residence of both children shall be that of the respondent, father, subject to the following:

Major decisions regarding health, education, schooling and religion shall be made by the Respondent, father. He shall pick the children's pediatrician. Emergency care may be provided by either parent as needed with notice to the other parent within two hours of the care being provided.

The Petitioner, mother's, physical custodial periods shall be as follows:

1. Alternate weekends from Friday at 3:00 PM or immediately after school until 6 P.M. on Sunday evening. During the school year on the Friday of the mother's weekends if there is no school the exchange time will not change. If school lets out early for any reason the time shall not change. If a school function causes a child to not be available at the pick-up time then the pick-up time will occur immediately after the school event is over. The teachers are to be provided a schedule of the exchange times so that they will be aware who is responsible for pick-up of the children from school. Mother shall assist with school home work during her weekends with the children.

This court is intentionally not granting visitation during the week for the mother at this time. The alternate week ends shall start the first week end in January 2002. Each week end shall start on a Friday.

2. Unspecified three day holidays and special days shall be spent with the parent having regularly scheduled contact, in accordance with exchange hours and locations previously delineated.

3. Whenever possible, exchanges shall occur at a school site or child care provider with pick-up and return occurring at the hours designated by the academic environment. When school is not in session and there is no designated place for the exchange, the exchange shall be at a neutral public site or shall be provided by a neutral third party. If the parties can not agree the organization FACES shall be used for the exchanges that do not take place at school. If FACES is not available the local police department of the city where the father resides shall be used.

4. Holidays supersede the regular contact schedule and are as following:

   A. Thanksgiving Holiday Weekend: The holiday shall begin immediately after the school day ends on the Wednesday immediately preceding Thanksgiving Day until the children are returned to school the following Monday morning. Even numbered years with the mother and odd numbered years with the father.

B. Christmas Holiday: In the following years this holiday shall be divided equally between the parents. The first one half in odd numbered years to Father until 11 AM on the 25th and the second one half to mother in odd numbered years and to alternate thereafter.

C. Easter Holiday: The Easter Holiday shall be alternated between the parents beginning on the Friday before Easter Sunday until the Monday morning following Easter Sunday. Even numbered years the holiday shall be spent with the mother; Odd numbered years with the father.

D. Father's Day/Mother's Day: Spent with each gender specific parent from 10:00 a.m. Sunday to 6:00 PM on Sunday.

E. Legal and School Holidays: The ones that are contiguous with a weekend and not specified in the holiday plan shall be spent with the parent having the scheduled weekend contact. The time spent shall begin the day and hour school ends with a return to school the morning that school resumes.

F. Children's Birthdays: The children will be with the father in all even numbered years and with mother in all odd numbered years. None of this time is to interfere with the schooling of the children. Time for birthdays will be after school to 8:00 p m if on a school day.

G. Summer Vacation: Each parent shall have the option to schedule a vacation for up to fourteen consecutive days during their designated summer period. When vacationing outside of Orange County, they shall notify the other parent of their vacation plans, in writing by May 1st of each year. Prior to the vacation the parents shall also provide information regarding the destination, dates of arrival and departure, mode of transportation and emergency contact telephone numbers. During said vacations regularly scheduled weekend and mid-week contact shall not occur for the other parent.

H. No summer vacation shall be planned less that one (1) week prior to the start of school. The is to allow the children time to prepare for the start of school and get back onto a school schedule.

I. In the event of a conflict, the mother's vacation plans shall have priority during the even numbered years and father shall have priority in odd numbered years, so long as both notify the other by May 1st of the year.

J. The parents may by "mutual agreement" plan vacations longer than two weeks so long as the agreement is in writing and is signed by both parties prior to May 1st of the year involved.

K. The children shall continue in therapy. They are to be seen on at least a bi-weekly basis. It is preferable that the parents shall alternate taking the children to their therapy sessions.

Should either parent be unable to or declines to take the children for an appointment the other parent may take the children. The schedule shall be as set by the Doctor.

L. Both parents shall enroll in counseling for assistance is developing more appropriate communication skills and constructive problem solving techniques.

SPECIAL ORDERS AND FINDINGS:

1. The foregoing visitation order is intended by the court to allow the minor children to have quality time with each parent.

2. Each parent may have telephone contact with the children between the hours of 4 PM and 6 PM on Monday, Wednesday and Friday of each week while they are with the other parent unless other arrangements have been made between the parents. The children may be allowed to call either parent during the above stated times.

3. Father shall advise the Mother of the children's participation in any school-related or other structured activities. This court encourages both parents to be involved in their activities and to show support for them at all times.

4. Each parent shall have access to school records at all times no matter which parent placed the child into school. Both parents shall be named on the enrollment card at the school for any emergency. All of their records shall bear the name of "Hardwick".

5. The Respondent, Father, shall have the sole duty and responsibility to select the doctor that is treating the minor children and he shall advise the mother of the medication type and amount to be given the children. The advisement shall be in writing and the Petitioner, Mother, is ordered to follow the instructions exactly. If the Mother disagrees as to the need or amount of medication she is to obtain her own examination and file a new and different Order to Show Cause so that a Judge of the Superior Court may take evidence as between the doctors selected by the parties.

6. If either party wishes to modify this order, that person is to make an appointment with meditation and advise the other in writing of the date and time of the interview. Both parties are ordered to attend and to "in good faith" attempt to arrive at an agreement that is "in the best interest of both children" prior to filing any order to show cause to modify this order.

7. Mother is ordered not to file any action for change of these orders without first consulting with minor's attorney Ms. Sharon Grier. The attorney for the children shall remain as their attorney until relieved by the court and may at any time apply to the court "ex parte" for orders to protect the minor children.

7. Each parent shall carefully avoid the scheduling or arranging of any activities for the children which are likely to conflict with any visitation or period of custody allocated to the other parent. Each party is restrained from enrolling either of the children in any activity which would conflict

with the parental sharing plan stated herein, unless they have the explicit written agreement of the other parent.

8. Should either of the children suffer any type of injury and/or any other type of health infirmity during a period of time in which either party cannot be reached by any health care provider which is caring for the child of the marriage then either party shall be deemed legal guardian for the purpose of rendering aid.

9. Each parent shall keep the other advised at all times of his and her current residence address; telephone numbers (both home and work) and the child's school and also the location of any place where the child may be spending any extended time period in excess of one week.

10. Neither parent shall use any such information for the purpose of harassing nor annoying the other in any way and each party is hereby specifically restrained and enjoined from disturbing the peace of the other or invading the other's privacy.

11. Neither party may move either of the children from the state of California without first giving the other party written notice as required by California Family Code §3024. California is found to be the home state of the children at this time.

12. Each party is restrained from attempting to turn either of the children against either the mother or the father by discussing their shortcomings or from allowing any third party to do so in their presence.

13. The parties shall not attempt to buy the children's favor by presents or by special treatment or allow any third party to do so.

14. Neither party shall swear at, curse at, verbally demean, nor otherwise subject either of the children to verbal abuse.

15. Neither party shall knowingly allow them to be subjected to corporal punishment nor subjected to verbal abuse by any third person.

16. Neither parent shall use or make, nor allow any other person to use or make any disparaging or derogatory remarks to or about the other parent in the children's presence.

17. This Court is intentionally omitting any order for the "right of first refusal" in the shared time with the minor children. This Court finds that the stability of the children at this time is the most important item. They need to know which parent they are going to be with from day to day and week to week. Pressure has been placed upon them to make decisions that children should not have to make. Any action taken by either of the parents to modify this order within the next six (6) months should have the court assigned appoint a special master or a case manager to address the welfare and safety of these children. This is a recommendation and not a court order at this time. This decision shall left to the court assigned at that time.

This court is trying to consider the past, be aware of the present, and make orders for the future of these children that will allow them to

have a relationship with both parents. If the mother is unable or refuses to forget the past this order will not succeed and litigation will continue causing the children to suffer greatly. Kendall wrote what was intended by her to be a short story. This "short story" gave great insight into the problems of this case from the beginning. The "story" went as follows:

> "The Hardship's by Kendall Hardwick"
>
> "There once was two girls named Ashely and Jodi that lived with there dad because a long time ago when Ashely and Jodi were little there mom would tell them lies about there dad. Then when they were nine years old and six years old they told there Dr. Mitchell about what there mom said to them."

It is obvious to this court that the child was trying to share her feelings about her situation. The reference to Dr. Mitchell as "there Dr. Mitchell" is clear. I have included this with the child's wording and spelling to show to all concerned that this child is asking for help and it is the responsibility of the parents to furnish this help without self interest.

ATTORNEY FEES:

The Petitioner, Mother, is a former Miss California. She works part time at the company that is owned by her parents. She deeded her home to her parents and they pay all of her expenses at this time. The following information was revealed during trial

and by the income and expense declaration of the Petitioner, Mother, signed by her on May 25, 2001 and filed the same date with the court:

1. Her monthly expenses are $4,991.00
2. Her parents are paying approximately $5,000.00 of her expenses monthly
3. She claimed to be unemployed (She last worked 11-14-1956)
4. She signed another income and expense declaration on December 20, 2000 that stated she worked for her father's company, California Wholesale, in Los Alamitos, California and had worked there part time since December 1996.It was noted by the court that there are other differences in the two separate declarations. On the first one she stated her expenses were $13,978.92 per month and that all of these were paid by her parents as a loan.
5. Her date of birth is 11-14-1956 (She is 45 years of age)
6. She has 14 years of education with no degrees
7. She drives a new Ford vehicle with a lease payment of $650.00 which she states is also paid by her parents.
8. She is in good health and is physically able to work. She makes a good appearance and has acted in the past as a spokesperson in public relations.

9. She stated that as of May 25, 2001 she had paid $129,212.37 to various attorneys and still owed $67,000.00. (It should be noted that this is one of several reason why this court could not believe that she did not visit with her two girls for almost a year because she stated she could not afford to pay the monitors.) Her answer to my asking her that question was that she was borrowing the money from her parents and could not afford to pay the monitor.

Her parents wishing to keep her as a part time employee and pay her expenses of $5,000.00 per month is acceptable to this court. This court finds that her income is $5,000.00 per month net earnings and earning ability. I'm sure that her parents are fully aware of the value of her services to their company and are paying her what she is entitled to receive.

For attorney fees based upon need and ability each party is ordered to pay their own fees and costs. This Court having reviewed the file and heard the testimony finds that it is fair and just under the relative circumstances of the respective parties that each party pay their own fees under section 2032 of the Family Code.

For attorney fees based upon sanctions and Family Code Section 3027.1 this court finds that the actual reports of suspected child abuse by the father upon the minor child were made by a "required reporting person". It is believed by the Respondent,

Father, that the mother programed the minor child to make the claim. The story, written by the child, referred to above appears to verify this claim. This court finds by a preponderance of evidence that the Petitioner, Mother, placed the child with the reporting party to have the Father investigated for child abuse. The Petitioner believed the information to be true and she used the child to have the investigation started by the juveniles authorities. She took the, child to a licensed mental health professional for suspected sexual abuse, expecting that the provider would make the report.

This court can not find that the actions of the Petitioner, Mother, were with the knowledge that the accusation of child abuse was false at the time the accusation was made. It is clear that she believed it to be true at the time. (and still does) This section requires that the person be acting in bad faith and knowing the claim to be false makes a claim of child abuse. This requirement of the statute is missing in this case.

Each party, is to pay their own attorney fees and costs as of this date owed to their own attorneys. The parties are ordered to each pay one half of the fees for the attorney for the children for any future fees caused by future litigation. The court finds the balance at this time for the attorney, for the children to be $15,000.00. The income of the Father is three times that of the Mother, however he has paid for the 730 evidence code experts and cared for the children for some time without financial support from the

Mother. Each of the parties are ordered to pay one half of the fees for the children's attorney: $7500.00 each. This amount is due and owing at this time and will draw interest at the legal rate until paid.

CHILD SUPPORT:

The Petitioner, Mother, is ordered to pay directly to the Respondent, Father, the sum of four hundred and five dollars ($478.00) per month payable one half on the 1st and one half on the 15th of each month starting November 1st, 2001 and continuing each month thereafter until each child reached the age of majority or 19 years of age if still in high school full time, dies, becomes fully self supporting or further order of court.

Findings for the basis of the child support order are stated on the DissoMaster printout attached hereto and incorporated herein. As stated above the Petitioner, Mother, worked as a law clerk and earned $21.00 per hour. She actually worked more than 40 hours per week but this court is finding her earning ability to be based upon a regular 40 hour week. She left this employment of her own volition due to a "billing conflict". She is healthy, presents well, well educated and has experience as a law clerk. She is qualified to take the California Bar Examination to become an attorney. She has the ability to earn at least the same she was making when she left her last job.

The Respondent, Father, is ordered and directed to maintain the health insurance for the benefit of the children so long as they are minors and are entitled to be covered by his insurance. He will pay the cost of said insurance. Both parents shall co-operate in the presentation of any claims under said insurance and each shall pay one half of the amount not covered by insurance. If either parent has to pay for uncovered health needs for the children the other parent is ordered to reimburse the other parent within 30 days of proof of payment by the paying parent.

Each parent shall maintain child care for the children while the children are in the respective parent's care and physical custody.

FACTUAL FINDINGS:

Dr. Lipsitz was appointed by the Court under authority of Section 730 of the California Evidence Code. His report recommended custody to the Father. Most of the action since his recommendation has been brought by the Petitioner, Mother, in an effort to convince the Court not to follow Dr. Lipsitz's recommendation.

The Petitioner hired Dr. Drozd under authority of Section 733 of the California Evidence Code to evaluate Dr. Lipsitz's work performance and prepare a report. Dr. Drozd was not appointed by the Court. She was hired by the Petitioner, paid by the Petitioner and reported directly to the Petitioner.

Dr. Drozd never examined the Respondent, Father, during her investigation. She never saw the father with the children and she is not able to give any opinion as to which parent is best able to care for the children in this case. Her opinion was concerning the quality of work performed by Dr. Lipsitz. Because of this limitation and her opinion that Dr. Lipsitz did not do a "good" job this court felt that an impartial opinion from another expert would assist the court in its final decision of what was in the best interest of the children. This Court appointed another 730 CEC expert, Dr. Geri Olin, to do an update of all the reports and give the court an opinion of the "present" recommendation of best interest of the children.

Dr. Olin's report was completed and made available to the attorneys, the court and the parties as of April 9th, 2001. Dr. Olin's recommendation was reviewed by this Court.

Dr. Olin's report on page 20 paragraph one (1) stated,

> "Under no circumstances shall any of the information contained in this report be discussed with the children by either parent, nor shall the children be questioned about any of their comments noted in the body of this report".

It came to the court's attention that the Petitioner, Mother, took her copy of the report and discussed with the children the

> statements made by the children to Dr. Olin. This court does not believe that this conduct is in the best interest of the children.
>
> The final declaration of the Petitioner, Mother, contains several direct statements attributed to the minor children. This court can only give these statements the weight that the court feels is due them under the specific circumstances of this case.

It is clear to this Court that the Petitioner, Mother, continues to discuss this case with the children. This Court believes that the children tell each parent what the child thinks the parent wishes to hear so that the respective parent will love the child involved more. (In the mind of the child) The danger is in the act of even discussing the case with the children.

Both parents must place the needs of the children above the pride and personal desires of themselves. Maybe counseling will help them do so.

> PREPARATION OF ORDER:
>
> Attorney for the Respondent, Father, is ordered to prepare the order after hearing and submit same to the court with a proof of service that it was served upon the Petitioner and her attorney of record at that time by mail at the address last on the pleadings.

IT IS SO ORDERED:

DATE: 12-31-2001 /s/ Walter D. Posey
Walter D. Posey:
Commissioner Superior Court

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

DEANNA FOGARTY-HARDWICK, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G039045 Sup. Ct. No. 01CC02379 **ORDER** (Filed Jul. 12, 2010)

The petition for rehearing is DENIED.

BEDSWORTH, J.
BEDSWORTH, ACTING P.J.

WE CONCUR:

O'Leary, J.
O'LEARY, J.

MOORE, J.
MOORE, J.

cc: See attached list

[List Omitted In Printing]

Court of Appeal, Fourth Appellate District, Division Three – No. G039045

S184795

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DEANNA R. FOGARTY-HARDWICK,
Plaintiff and Respondent,

v.

COUNTY OF ORANGE et al.,
Defendants and Appellants.

(Filed Sep. 29, 2010)

The request for judicial notice is granted.
The petition for review is denied.

GEORGE
Chief Justice

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNE FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 16, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:

LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:

BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[310] Q OKAY. GO AHEAD AND DESCRIBE FOR ALL OF US HOW THINGS CHANGED.

A WELL, PRIOR TO THAT, I THINK I'VE MENTIONED THAT I WOULD GO FREELY. I COMPLETELY PUT MYSELF IN THEIR HANDS. RACHEL DAVIS – I TRUSTED HER AND THERE WAS NO REASON NOT TO. AND SHE WAS WONDERFUL.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

MARCH 1, 2007

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:

LAW OFFICES OF SONDRA S. SUTHERLAND
BY: SONDRA S. SUTHERLAND, ESQ.

LAW OFFICES OF SHAWN A. MCMILLAN
BY: SHAWN A. MCMILLAN

FOR DEFENDANTS:

BEAM, BROBECK, WEST, BORGES & ROSA
BY: GLEN A. STEBENS, ESQ.

JENNIFER L. SCOTT, CSR #9218, RMR, CRR
OFFICIAL COURT REPORTER

* * *

[1491] MS. SUTHERLAND: CORRECT, YOUR HONOR.

I WILL BEGIN WITH WHAT IS MARKED AS EXHIBIT 229. THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT HELEN DWOJAK.

* * *

[1493] REQUEST NUMBER 15: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE MATTER OF HARDWICK, KENDALL AND PRESLIE, MINORS, SAME CASE NUMBERS.

ADMIT.

NUMBER 16: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE SAME MATTER.

ADMIT.

* * *

[1494] NOW I'M GOING TO TURN TO WHAT'S BEEN MARKED AS EXHIBIT 231. THESE ARE PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT ELAINE WILKINS.

REQUEST NUMBER 11: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

[1495] REQUEST NUMBER 12: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES IN YOUR HANDLING OF THE HARDWICK MATTER.

ADMIT.

* * *

TURNING NOW TO EXHIBIT 237, PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT MARCIE VREEKEN.

REQUEST NUMBER 13: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

NUMBER 14: ADMIT THAT YOU WERE AT ALL TIMES CARRYING OUT THE CUSTOMS, MEANING THE PERMANENT, WIDESPREAD, OR WELL SETTLED PRACTICES OF DEFENDANTS

ORANGE COUNTY SOCIAL SERVICES AGENCY IN YOUR HANDLING OF THE HARDWICK MATTER.

[1496] RESPONSE: ADMIT.

* * *

FINALLY, TURNING TO EXHIBIT 239, PLAINTIFF'S REQUEST FOR ADMISSIONS DIRECTED TO THE ORANGE COUNTY SOCIAL SERVICES AGENCY ITSELF.

* * *

[1497] REQUEST NUMBER 31: ADMIT THAT DEFENDANT MARCIE VREEKEN WAS AT ALL TIMES CARRYING OUT THE POLICIES OF DEFENDANT ORANGE COUNTY SOCIAL SERVICES AGENCY IN HER HANDLING OF THE HARDWICK MATTER.

RESPONSE: ADMIT.

REQUEST NUMBER 32 IS THE SAME REQUEST AS TO DEFENDANT ELAINE WILKINS, AND REQUEST NUMBER 34 IS THE SAME AS TO HELEN DWOJAK.

* * *

[1624] THE COURT: ALL RIGHT. JUNE 22ND, 2006, WITH APPARENTLY BOTH MR. MCMILLAN AND MS. SUTHERLAND PRESENT, AS WELL AS MR. STEBENS AND A COURT REPORTER AND THE WITNESS, WHO WILL NOW HEAR THE FIRST QUESTION.

(THE DEPOSITION OF LAWRENCE LEAMAN WAS READ INTO THE RECORD AS FOLLOWS:)

"QUESTION: SO YOU SERVED AS THE DIRECTOR OF THE ORANGE COUNTY SOCIAL SERVICE AGENCY FOR 20 YEARS?

[1625] "ANSWER: YES.

"QUESTION: CAN YOU GIVE ME THE BEGINNING AND ENDING DATES?

"ANSWER: IT WAS – I BELIEVE IT WAS NOVEMBER OF 1981, AND THERE MAY HAVE BEEN A FEW MONTHS THERE WHERE I WAS ACTING DIRECTOR, NOT OFFICIALLY APPOINTED. I'M NOT SURE. AND IT ENDED WHEN I RETIRED IN JANUARY OF 2003.

* * *

"QUESTION: SO YOU WERE THE PERSON WHO IS MOST RESPONSIBLE FOR ADMINISTERING, FOR EXAMPLE, THE CHILD WELFARE SERVICE PROGRAM; CORRECT?

"ANSWER: IN ORANGE COUNTY.

"QUESTION: IS THAT CORRECT?

"ANSWER: YES.

"QUESTION: AND YOU WERE THE PERSON WHO AT THE ORANGE COUNTY SOCIAL SERVICE AGENCY WAS RESPONSIBLE FOR [1626] MAKING SURE

THAT THE POLICIES CONTAINED WITHIN THE RELEVANT PORTION OF THE WELFARE & INSTITUTIONS CODE AND OTHER LAWS APPLICABLE TO CHILD WELFARE SERVICES WERE IMPLEMENTED AND CARRIED OUT IN THE COUNTY?

"ANSWER: TO THE EXTENT I HAD JURISDICTION, YES.

"QUESTION: AND YOU WERE IN FACT THE DIRECTOR OF THE SOCIAL SERVICE AGENCY AS OF FEBRUARY 17, 2000; CORRECT?

"ANSWER: YES.

* * *

[1627] "QUESTION: WHAT RESPONSIBILITY DID YOU HAVE AS OF FEBRUARY 2000 TO ASSURE THAT ADEQUATE TRAINING WAS PROVIDED TO SOCIAL WORKERS IN THE CHILD WELFARE SERVICES DIVISION OF THE SOCIAL SERVICE AGENCY?

"ANSWER: OVERSIGHT RESPONSIBILITY.

"QUESTION: TO YOUR KNOWLEDGE DID ANY – STRIKE THAT.

"DID EITHER MS. VREEKEN, MS. WILKINS, MS. DUMAS, OR MS. DWOJAK DO ANYTHING IN THEIR HANDLING OF THE KENDALL AND PRESLIE HARDWICK MATTER THAT DEPARTED

FROM THE ESTABLISHED POLICIES AND PRACTICES OF ORANGE COUNTY SOCIAL SERVICES AGENCY?

"ANSWER: I DON'T KNOW.

* * *

[1630] "QUESTION: * * * IN THE EVENT THAT ONE OF YOUR SOCIAL WORKERS DISCOVERED SOME FACT THAT WOULD DEMONSTRATE THE INCORRECTNESS OF THE ALLEGATIONS, WOULD THAT BE SOMETHING THAT YOU WOULD HAVE A POLICY WHICH WOULD MANDATE THE DISCLOSURE OF THAT FACT?

"ANSWER: I'M NOT AWARE OF A POLICY, PER SE, BUT IT WOULD BE MY EXPECTATION. IF WE'RE TALKING ABOUT A PRESENTATION TO THE COURT, THAT ALL [1631] DYNAMICS OF THE CASE BE PRESENTED, INCLUDING ANY INFORMATION THAT YOU DESCRIBED, SUCH AS YOU DESCRIBED.

"QUESTION: WHY IS THAT YOUR EXPECTATION?

"ANSWER: BECAUSE IN A COMPLETE INVESTIGATION, YOU PRESENT YOUR COMPLETE FINDINGS TO THE COURT.

"QUESTION: IS IT YOUR UNDERSTANDING YOUR DEPARTMENT HAD A DUTY AND THE SOCIAL WORKERS IN

YOUR DEPARTMENT HAD A DUTY TO DISCLOSE FACTS THAT WOULD DEMONSTRATE THE INNOCENCE OF A PARENT IN A PARTICULAR CASE?

"ANSWER: HANGING MY HAT ON THE WORD "FACTS," YES.

"QUESTION: AND WHY IS THAT?

"ANSWER: IT GOES BACK TO THE PREVIOUS ANSWER, THAT IT WAS MY EXPECTATION THAT THE FINDINGS OF AN INVESTIGATION THAT LED TO A PETITION TO THE COURT OR AN UP-DATE OF A PETITION TO THE COURT WOULD BE SHARED WITH THE COURT.

"QUESTION: DID YOU HAVE A POLICY TO THAT EFFECT?

[1632] "ANSWER: I DID NOT HAVE A WRITTEN POLICY TO THAT EFFECT, BUT IT WAS MY EXPECTATION.

"QUESTION: SO YOU'VE NEVER DIRECTED THAT DR. REILY PROMULGATE ANY WRITTEN POLICY TO THAT EFFECT, CORRECT?

"ANSWER: I DON'T REMEMBER DOING SO, NO."

* * *

[1633] MR. MCMILLAN: YOUR HONOR, WE'LL BE READING FROM THE DEPOSITION OF SUSAN HOLL, I WILL BE PLAYING THE PART OF SUSAN HOLL. AND IT WAS TAKEN ON

SEPTEMBER 15, 2006. PRESENT WERE MYSELF, MR. STEBENS, THE COURT REPORTER, SUSAN HOLL, AND ONE OF MY ASSOCIATES FROM MY OFFICE, I BELIEVE, REBECCA DAVALOS.

(THE DEPOSITION TESTIMONY OF SUSAN HOLL WAS READ INTO THE RECORD AS FOLLOWS:)

* * *

[1654] "QUESTION: OKAY. GETTING BACK TO SOME OF THE OTHER PRACTICES AND POLICIES THAT THE AGENCY HAS, IS THERE ANYTHING THAT SPEAKS TO, YOU KNOW, THE CONSEQUENCES OF A SOCIAL WORKER NOT PROVIDING ACCURATE, COMPLETE, OR OBJECTIVE INFORMATION TO THE COURT?

"ANSWER: WELL, JUST POLICY THAT THEY – THAT THEY NEED TO BE DOING THAT. AS I SAID BEFORE, THEY WRITE THE REPORT WITH THE PERJURY STATEMENT, THE ANTI-PERJURY STATEMENT, SO –

"QUESTION: SO WHAT ARE THE CONSEQUENCES FOR NOT PROVIDING ACCURATE AND COMPLETE AND OBJECTIVE REPORTS TO THE COURT?

"ANSWER: WELL, THAT'S A VERY GENERAL STATEMENT OR A VERY GENERAL QUESTION. I MEAN, IF SOMEONE WERE TO, [1655] YOU KNOW,

TO KNOWINGLY FABRICATE SOMETHING OR LIE ABOUT SOMETHING, THAT COULD BE GROUNDS FOR – I MEAN, IF THEY'RE – IT SAYS IN HERE, UNDER MALICE – JUST A SECOND.

"QUESTION: WHICH ONE ARE YOU LOOKING AT?

"ANSWER: JUST A SECOND. LET ME FIND IT:

"OKAY. HERE WE GO. I'M SORRY. IT'S CLIENT RIGHTS, AND IT'S NUMBER A-0309, APPROVED JULY 26, 2001.

"ON PAGE TWO IT TALKS ABOUT LAWFUL CONDUCT BY STAFF AND CIVIL LIABILITY, AND IT DEFINES MALICE AS CONDUCT THAT IS INTENDED BY THE SOCIAL WORKER TO CAUSE INJURY TO THE PLAINTIFF OR DESPICABLE CONDUCT THAT IS CARRIED ON WITH A WILLFUL AND CONSCIOUS DISREGARD OF THE RIGHTS OR SAFETY OF OTHERS, WHICH INCLUDE PERJURY, FABRICATION OF EVIDENCE, FAILURE TO DISCLOSE KNOWN EXCULPATORY EVIDENCE, OBTAINING TESTIMONY BY DURESS, FRAUD, OR UNDUE INFLUENCE.

"AND THEN IT GOES ON TO SAY THAT [1656] IMMUNITY OF SOCIAL WORKERS FROM CIVIL LIABILITY IS NOT ABSOLUTE AND INJURY RESULTING FROM ACTS OF OMISSIONS MADE

WHILE – LET ME SEE. I'M SORRY. THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL SERVICE WORKERS – I'M SORRY.

"THE CIVIL IMMUNITY OF JUVENILE COURT AND CHILD PROTECTION SOCIAL WORKERS DOES NOT EXTEND TO MALICIOUS ACTS AS DEFINED ABOVE.

"SO, CONSEQUENTLY, IT IS ESSENTIAL THAT ALL STAFF UNDERSTAND THEY MAY BE HELD PERSONALLY AND FINANCIALLY LIABLE FOR SUCH ACTS.

"QUESTION: OKAY. TO YOUR KNOWLEDGE, HAS THE AGENCY EVER DISCIPLINED A WORKER FOR MAKING AN INACCURATE STATEMENT IN A REPORT?

"ANSWER: AN INACCURATE STATEMENT?

"QUESTION: CORRECT. RIGHT.

"ANSWER: NO.

"QUESTION: AND THAT'S IN YOUR ENTIRE 20 YEARS AT THE AGENCY?

"ANSWER: YOU'RE ASKING – YOU [1657] ARE ONLY ASKING ABOUT INACCURATE STATEMENTS?

"QUESTION: CORRECT.

"ANSWER: NO.

"QUESTION: TO YOUR KNOWLEDGE, IN YOUR 20 YEARS AT THE AGENCY – ACTUALLY, MORE THAN 20 YEARS AT THE AGENCY – HAS ANY SOCIAL WORKER THAT YOU KNOW OF EVER BEEN DISCIPLINED FOR SUPPRESSING EXCULPATORY EVIDENCE?

"ANSWER: NOT TO MY KNOWLEDGE.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY – AND IT IS 22 YEARS, RIGHT?

"ANSWER: YES.

"QUESTION: IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SOCIAL WORKER OR SOCIAL WORKER'S SUPERVISOR, FOR THAT MATTER, BEEN DISCIPLINED FOR MAKING AN UNTRUTHFUL STATEMENT IN A REPORT?

"ANSWER: NOT TO MY KNOWLEDGE, NO.

"QUESTION: OKAY. AND IN YOUR 22 YEARS AT THE AGENCY, HAS ANY SUPERVISOR, SOCIAL WORKER, OR SUPERVISOR EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR SUPPRESSION OF EXCULPATORY EVIDENCE?

[1658] "ANSWER: WOULD YOU DEFINE WHAT THAT IS?

"QUESTION: WHAT WHAT IS? EXCULPATORY OR SUPPRESSION?

"ANSWER: EXCULPATORY.

"QUESTION: DO YOU UNDERSTAND WHAT EXCULPATORY MEANS?

"ANSWER: NO. THAT'S WHAT I'M ASKING.

"QUESTION: OKAY. LET ME ASK IT THIS WAY: WHAT WOULD YOU REFER TO AS INFORMATION – WHAT WOULD YOU CALL INFORMATION THAT WOULD INDICATE THAT A CLIENT DID NOTHING WRONG OR DID NOTHING THAT WOULD HAVE REQUIRED THE REMOVAL OF THE CHILD FROM THE HOME? WHAT WOULD YOU CALL THAT TYPE OF EVIDENCE?

"ANSWER: IN A CHILD ABUSE REFERRAL, IT WOULD BE CALLED UNFOUNDED.

"QUESTION: UNFOUNDED.

"IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY, HAS ANY SUPERVISOR OR SOCIAL WORKER EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR PRESENTING UNFOUNDED EVIDENCE OR MAKING UNFOUNDED ACCUSATIONS?

[1659] "ANSWER: NO.

"QUESTION: HOW ABOUT HAS ANY SOCIAL WORKER IN YOUR 22 YEARS OF EXPERIENCE AT THE AGENCY – HAS ANY SOCIAL WORKER OR SOCIAL

WORKER'S SUPERVISOR EVER BEEN DISCIPLINED IN ANY WAY AT ALL FOR HIDING OR KEEPING EVIDENCE AWAY FROM THE COURT THAT WOULD HAVE RESULTED IN REMOVAL OF THE CHILD FROM THE PARENT'S CUSTODY?

"ANSWER: NO, NOT TO MY KNOWLEDGE.

"QUESTION: AND YOU REMEMBER WE TALKED ABOUT THIS SOMEWHAT AT LENGTH THAT YOU WERE DESIGNATED AS THE PERSON MOST KNOWLEDGEABLE – OR, RATHER, MOST QUALIFIED TO TESTIFY ON BEHALF OF ORANGE COUNTY SOCIAL SERVICES REGARDING THE POLICIES AND PROCEDURES AS APPLIED IN THE CASE INVOLVING DEANNA FOGARTY-HARDWICK; CORRECT?

"ANSWER: YES."

* * *

No. G039045

COURT OF APPEAL – FOURTH DISTRICT

DIVISION THREE

STATE OF CALIFORNIA

FOGARTY – HARDWICK

vs. **NO. 01CC02379**

COUNTY OF ORANGE

APPEAL FROM THE SUPERIOR COURT
OF CALIFORNIA
COUNTY OF ORANGE

HONORABLE RONALD L. BAUER,
JUDGE/COMMISSIONER

CLERK'S TRANSCRIPT

(Filed Nov. 6, 2007)

APPEARANCES

ATTORNEY FOR APPELLANTS/DEFENDANTS
COUNTY OF ORANGE
MARCIA VREEKEN; HELEN DWOJAK

BUCHALTER NEMER, APC
ROBERT M. DATO
EFRAT M. COGAN
18400 VON KARMAN AVENUE, SUTIE 800
IRVINE, CA 92612-0514

(949) 760-1121
AND
BEAM BROBECK WEST BORGES & ROSA LLP
BRYON J. BEAM
GLEN A. STEVENSF
600 W. SANTA ANA BLVD., SUITE 1000
SANTA ANA, CA 92701-4586
(714) 558-3944

ATTORNEY FOR RESPONDENT/PLAINTIFF
DEANNA R. FOGARTY-HARDWICK

SHAWN A. MACMILLAN
THE LAW OFFICES OF SHAWN A. MCMILLAN
4955 VIA LAPIZ
SAN DIEGO, CA 92122
(858) 646-0069

VOLUME 2 OF 11
PAGES 301-600

* * *

[20] LAMOREAUX JUSTICE CENTER –
ORANGE, CALIFORNIA

THURSDAY, FEBRUARY 17, 2000

MORNING SESSION

DEPARTMENT L-31

HON. GARY BISCHOFF, REFEREE

THE COURT: ALL RIGHT. WE ARE ON THE RECORD IN THE MATTER OF [K.] AND [P.] HARDWICK.

APPEARANCES FOR THE RECORD, PLEASE.

MS. RILEY: JOYCE RILEY, DEPUTY COUNTY COUNSEL, ON BEHALF OF SOCIAL SERVICES AGENCY.

MS. CIANFRANI: KAREN CIANFRANI FOR THE CHILDREN.

MS. BENDER: CARA BENDER ON BEHALF OF THE MINORS' MOTHER, DEANNA HARDWICK. SHE IS PRESENT IN COURT. IN ADDITION, THE MINORS' MATERNAL GRANDFATHER AND NANNY IS PRESENT IN COURT.

MR. STAPLETON: MARLIN STAPLETON ON BEHALF OF THE MINORS' FATHER. HE IS PRESENT IN COURT.

THE COURT: WE ARE HERE TODAY FOR A REVIEW THAT THE COURT SET BECAUSE THE COURT WAS CONCERNED ABOUT THE LEVEL OF VISITATION AND SOME OF THE CONFLICTS THAT WERE OCCURRING BETWEEN THE PARENTS REGARDING THE CHILDREN. SO THE COURT SET THIS DATE TO DETERMINE WHAT, IF ANY, ACTION THE COURT SHOULD TAKE.

I HAVE READ AND CONSIDERED THE REPORT, WHICH IS DATED TODAY'S DATE.

THE RECORD SHOULD ALSO REFLECT THAT THE COURT [21] AND COUNSEL CONFERRED PRIOR TO GOING ON THE RECORD AND HAD A DISCUSSION WITH MARCIE VREEKEN REGARDING SOME OBSERVATIONS

THAT THE WORKER MADE IN THE CASE. AND I HAVE INDICATED TO COUNSEL THE COURT'S INCLINATION IS TO ORDER SOCIAL SERVICES TO MOVE THE CHILDREN FROM THE MOTHER'S CARE PENDING THE NEXT HEARING.

COUNSEL, DID YOU WANT TO BE HEARD?

MS. BENDER: YES, YOUR HONOR.

WELL, YOUR HONOR, OBVIOUSLY, WE WOULD ADAMANTLY OPPOSE THE COURT'S DIRECTION TO HAVE SOCIAL SERVICES REMOVE THE MINORS FROM THEIR MOTHER'S CARE AT THIS TIME. OUR POSITION IS, YOUR HONOR, THAT THE MOTHER DID FOLLOW THE VISITATION ORDERS. THE MOTHER TRANSPORTED THE CHILDREN FOR THE VISITATIONS THAT WERE SCHEDULED TO OCCUR IN BETWEEN THE LAST COURT DATE AND TODAY'S DATE.

THE MOTHER HAD NO CONTROL OVER WHETHER THE CHILDREN WANTED TO VISIT WITH THEIR FATHER ON ANY PARTICULAR DAY, AND SHE SO RESPECTED THE COURT'S ORDER THAT SHE DID TAKE THE CHILDREN TO THE VISITATION, EVEN THOUGH SHE DID HAVE CONCERNS ABOUT THE VISITATION OCCURRING WITH MR. DELGADEO MONITORING THE VISITS IN LIGHT OF THE ALLEGATIONS THAT HAD BEEN MADE REGARDING ALLEGED CONDUCT THAT HAD OCCURRED DURING A PREVIOUS VISITATION THAT HE MONITORED.

YOUR HONOR, MS. VREEKEN ONLY GAVE US INFORMATION TODAY ABOUT INFORMATION THAT SHE RECEIVED [22] REGARDING SOMEONE ELSE'S OBSERVATIONS. THE COURT INDICATED THAT BASED ON SOME OBSERVATIONS THAT MS. VREEKEN HAD. THE ONLY INFORMATION THAT SHE IMPARTED TO THE COURT AND COUNSEL WAS INFORMATION THAT ALLEGEDLY ANOTHER SOCIAL WORKER HAD OBSERVED WHICH MY CLIENT VEHEMENTLY DENIES AT THIS TIME.

YOUR HONOR, AS I MENTIONED EARLIER THIS MORNING WHEN WE WERE DISCUSSING THE CASE, I SPOKE WITH THE CHILDREN'S THERAPIST THIS MORNING AND DISCUSSED WITH HER THE IMPACT THAT REMOVAL FROM THE MOTHER'S CARE WOULD HAVE ON THESE CHILDREN, AND SHE INDICATED THAT IT WOULD BE SEVERELY, SIGNIFICANTLY TRAUMATIC FOR THESE CHILDREN TO BE REMOVED FROM THEIR MOTHER'S CARE AT THIS POINT IN TIME.

I WOULD JUST STRENUOUSLY URGE THE COURT NOT TO MAKE AN ORDER DIRECTING SOCIAL SERVICES TO REMOVE THE CHILDREN FROM MOTHER'S CARE BECAUSE IT'S GOING TO BE INCREDIBLY TRAUMATIC FOR THESE CHILDREN. THEY ARE FRAGILE AS IT IS, AND MOTHER HAS OBEYED THE COURT'S ORDER TO FACILITATE THE VISITATION.

I WILL SUBMIT ON THAT AT THIS POINT.

THE COURT: MS. VREEKEN, YOUR COMMENT WAS THAT THE MOTHER HAD TOLD THE CHILDREN IN SOMEONE'S PRESENCE THAT THE FATHER WAS TRYING TO TAKE THE CHILDREN AWAY FROM HER?

MS. VREEKEN: YES.

THE COURT: AND WHO WAS THE PERSON THAT WAS PRESENT WHEN THAT STATEMENT WAS MADE?

MS. VREEKEN: ELAINE WILKINS.

[23] THE COURT: IS THAT THE LADY THAT'S SITTING NEXT TO YOU?

MS. VREEKEN: YES.

THE COURT: MA'AM, IS THAT WHAT WAS SAID?

MS. WILKINS: YES.

MR. STAPLETON: YOUR HONOR, UNLESS THE COURT IS INCLINED TO CHANGE ITS INDICATED RECOMMENDATION, I WOULD SUBMIT.

AS THE COURT KNOWS, OUR POSITION IS THAT THE MOTHER IS EXERTING AN ENORMOUS AMOUNT OF INFLUENCE OVER THESE CHILDREN AND THAT IT'S VERY CLEAR FROM THE SEQUENCE OF EVENTS JUST IN THE LAST

WEEK, LET ALONE THE LAST SEVERAL MONTHS, THAT THIS IS OCCURRING. AND THE ONLY WAY WE ARE GOING TO KNOW WHAT'S HAPPENING IN THIS CASE IS TO HAVE THESE KIDS PLACED IN A NEUTRAL SETTING WHERE THIS STUFF DOESN'T OCCUR. IT'S VERY OBVIOUS IT'S OCCURRING. WE KNOW THE CHILDREN – AT LEAST [K.] IS MAKING ALLEGATIONS WITH REGARD TO THE MONITORS AND NOW WE HAVE TO GET TO THE BOTTOM OF THIS.

WE HAVE ANOTHER ALLEGATION THAT APPARENTLY IS MADE TO THE CHILDREN'S THERAPIST THAT THE SOCIAL WORKER IS "THE ONE WHO TOLD US THAT WE ARE GOING TO BE PUT IN A FOSTER HOME." IT'S VERY CLEAR THAT'S HAPPENING AND IT'S VERY CLEAR THAT – I UNDERSTAND THAT IT'S TRAUMATIC AND NOBODY WANTS TO SEE THIS HAPPEN TO THE CHILDREN, BUT ON THE OTHER HAND, THESE KIDS ARE BEING TRAUMATIZED WHERE THEY [24] ARE. THE KIDS JUST DON'T KNOW IT.

THEY NOW THINK THEIR FATHER IS SOME SORT OF MONSTER, TO THE POINT OF THROWING A TANTRUM AND HAVING HORRIBLE FITS WHEN THEIR MOTHER IS GETTING THEM READY FOR VISITS WITH FATHER. THEN WE HEAR BY THEMSELVES WITH THE FATHER, THEY SEEM TO BE JUST FINE. THAT'S NOT FAIR AND IT SHOULD BE FIXED.

THE COURT: MS. CIANFRANI?

MS. CIANFRANI: THIS IS SO DIFFICULT WHEN WE WERE IN COURT JUST A WEEK AGO AND THE MOTHER WAS IN COURT AND SHE HAD SPECIFIC INSTRUCTIONS ABOUT COOPERATING WITH THE VISITS. TO EVEN THINK THAT SHE WOULD TELL THE CHILDREN THAT THEIR FATHER IS TRYING TO GET THEM REMOVED FROM THE HOME IN FRONT OF A MONITOR BAFFLES MY MIND.

I MEAN, I DO THINK THIS IS A DILEMMA. IT WILL BE TRAUMATIC FOR THE CHILDREN TO BE REMOVED. AND, ALSO, WHEN THE CHILDREN ARE REMOVED, THEY ARE GOING TO THINK IT'S FATHER'S FAULT AND IT'S GOING TO FALL INTO WHAT MOTHER SAID. I DON'T SEE A WHOLE LOT CF CHOICES. I DON'T KNOW IF THERE IS A RELATIVE OR A LESS SEVERE WAY THAN BRINGING THEM INTO ORANGEWOOD.

I RECEIVED THE PHONE CALL FROM MY INVESTIGATOR ON THE HOLIDAY, FRIDAY, THAT MOTHER WAS PAGING HER, TRYING TO CLARIFY THINGS. AND I HAD EXPLAINED TO HER THAT I KNEW MOTHER HAD TALKED TO HER OWN ATTORNEY. THE MOTHER HAD BEEN IN COURT AND KNEW WHAT THE RULES WERE, BUT IN ONE WEEK – I [25] AM GOING TO SUBMIT ON THIS AND ASK THAT IF THE CHILDREN ARE REMOVED, THAT THEY DO IT AS GENTLY

AS POSSIBLE AND FIND AS MUCH OF A HOME LIFE SETTING AS POSSIBLE.

MR. STAPLETON: YOUR HONOR, WITH REGARD TO THAT –

THE COURT: HOLD ON.

MS. RILEY?

MS. RILEY: YOUR HONOR, THE AGENCY HAS SUBMITTED THE REPORT WITH ALL THE INFORMATION THAT IT HAS. IT IS NOT IN A POSITION TO RECOMMEND ONE WAY OR THE OTHER. THIS IS DISTURBING. SO WE WILL JUST SUBMIT IT TO THE COURT.

MS. BENDER: YOUR HONOR, MAY I RESPOND BRIEFLY?

THE COURT: GO AHEAD.

MS. BENDER: WELL, YOUR HONOR, WITH RESPECT TO THE COMMENTS THAT MS. CIANFRANI MADE, THE MOTHER DID MAKE SEVERAL PHONE CALLS IN ORDER TO CLARIFY WHETHER OR NOT MR. DELGADEO WAS APPROVED TO BE THE MONITOR FOR THE VISITATION OVER THE WEEKEND.

THE COURT: I KIND OF WONDER ABOUT THAT, COUNSEL, BECAUSE I SEEM TO RECOLLECT AT THE LAST HEARING SPECIFICALLY INDICATING THAT MR. DELGADEO WOULD BE AN APPROPRIATE MONITOR, AND YOUR CLIENT WAS HERE. SO WHY IS SHE

CALLING SOMEBODY TO TRY TO GET ANOTHER OPINION AS TO WHAT THE COURT JUST SAID?

MS. BENDER: WELL, YOUR HONOR, I KNOW THAT MY CLIENT CONTACTED ME AS WELL BECAUSE OF THE CONCERN THAT MR. DELGADEO HAD PREVIOUSLY BEEN REMOVED AS THE MONITOR, [26] AND IT DIDN'T APPEAR AT THIS POINT HE WOULD BE A NEUTRAL MONITOR. AND WOULDN'T IT BE WISER TO HAVE SOMEONE WHO WAS A NEUTRAL MONITOR IF THEY COULD FIND A MONITOR THAT WOULD BE APPROPRIATE AND AGREED UPON BY BOTH PARENTS?

THE COURT: SO EVEN AFTER I MADE THE ORDER, EVEN AFTER I HAD INDICATED THAT MR. DELGADEO WAS AN APPROPRIATE MONITOR, YOUR CLIENT WAS STILL CALLING AROUND TO SEE WHAT SHE COULD DO, MANIPULATING THAT SITUATION SO THAT WE WOULD HAVE SOMEBODY ELSE AS A MONITOR; IS THAT IT?

MS. BENDER: WELL, YOUR HONOR, NO. I DON'T BELIEVE THAT THAT IS THE CASE. I KNOW THAT WE HAD OFF-THE-RECORD DISCUSSIONS –

THE COURT: NO. THIS WAS ON THE RECORD, COUNSEL. I AM WILLING TO BET YOU THAT IT'S ON THE RECORD. I TALKED ABOUT MR. DELGADEO SPECIFICALLY WHEN I WAS TALKING TO THE PARENTS AND TALKING

ABOUT HOW THEY HAD TO COOPERATE WITH THE SITUATION. AND THAT'S WHY I HAVE A HARD TIME UNDERSTANDING THAT YOUR CLIENT, AFTER I HAVE MADE THE ORDER ALREADY THAT MR. DELGADEO WOULD BE AN APPROPRIATE MONITOR – UNDERSTANDING WHY YOUR CLIENT IS STILL TRYING TO GET OTHER FOLKS TO CHANGE THAT.

MS. BENDER: WELL, YOUR HONOR, IT WAS MY RECOLLECTION THAT THE COURT DID INDICATE THAT THE PRIOR VISITATION SCHEDULE AS IT HAD BEEN SET UP WAS APPROPRIATE. IT WAS NOT MY RECOLLECTION THAT THE COURT SPECIFICALLY MENTIONED HECTOR DELGADEO ON THE RECORD.

[27] I KNOW WE HAD NUMEROUS DISCUSSIONS OFF THE RECORD, AND I RELAYED THAT INFORMATION TO MY CLIENT. IT WAS NOT MY RECOLLECTION THAT YOU SPECIFICALLY STATED HECTOR DELGADEO. I RECALL THE COURT SPECIFICALLY STATING THAT THE PRIOR VISITATION HAD BEEN SET UP AND WAS COMPLETELY APPROPRIATE – I APOLOGIZE –

THE COURT: WE CAN GO OFF THE RECORD. YOU HAVE GOT YOUR NOTES FROM FEBRUARY 8TH?

(RECORD READ.)

THE COURT: IT DOES APPEAR THE MOTHER WAS NOT PRESENT WHEN THE

COURT DISCUSSED MR. DELGADEO SPECIFICALLY.

ANYTHING ELSE?

MS. BENDER: YOUR HONOR, JUST TO ADD THAT MOTHER INFORMED ME THAT IT'S ANOTHER PERSON THAT WAS PRESENT WHEN THERE WAS A DISCUSSION THAT OCCURRED; THAT MS. VREEKEN AND MS. WILKINS – THE MOTHER IS ADAMANTLY DENYING THAT THOSE STATEMENTS WERE MADE REGARDING WHETHER OR NOT IT WAS SAID.

TO TAKE THE CHILDREN OUT OF THE MOTHER'S CARE AND CUSTODY AGAIN – SHE IN NO WAY HAS INFLUENCED THE CHILDREN AND HAS IN NO WAY TRIED TO INTERFERE WITH OR OBSTRUCT THE COURT'S VISITATION ORDER.

THE COURT: OKAY. COUNSEL?

MR. STAPLETON: YOUR HONOR, AS TO-THE ISSUE OF MR. DELGADEO, MS. BENDER SPECIFICALLY SAID THAT HER CLIENT CALLED HER – NOT TO GET TO ANY ATTORNEY-CLIENT PRIVILEGE STUFF – BUT HER CLIENT CALLED HER TO ASK. AND MS. BENDER [28] WAS CERTAINLY PRESENT WHEN THAT STATEMENT WAS SAID, THAT HECTOR WAS FINE. WE HAVE TO ASSUME THAT THAT KIND OF INFORMATION HAS BEEN RELAYED, BUT THAT'S A SIDE-TRACKED ISSUE.

THE ISSUE IS STILL THAT SHE IS STILL – THAT'S WHAT WE ARE WORRIED ABOUT ANY MORE THAN ANYTHING ELSE – SHE IS STILL EXERTING THIS INFLUENCE OVER THESE CHILDREN BY MAKING THESE STATEMENTS. THE DAUGHTER CALLED UP LAST NIGHT AND MAKES THIS STATEMENT TO HER FATHER AND HANGS UP. THAT IS INFERRING, WITHOUT A DOUBT, IT DOESN'T REALLY MATTER ABOUT HECTOR AT THIS POINT IN TIME.

WHAT MATTERS IS ALL THE INFLUENCE THAT'S BEING EXERCISED OVER THESE CHILDREN, AND THAT'S WHAT WE HAVE ALLEGED FROM THE BEGINNING IN THIS CASE. NOW IT'S FINALLY COMING OUT, AND THE ONLY WAY WE CAN FIND OUT WHAT'S REALLY HAPPENING IN THIS CASE IS TO REMOVE THE CHILDREN, AS SAD AS THAT IS AND AS HARD AS THAT IS.

THERE IS A COUSIN, MY CLIENT'S COUSIN, WHO HAS TWO DAUGHTERS OF HER OWN THAT – I KNOW HE HAS MADE A REQUEST FOR PLACEMENT. THE PREVIOUS LAWYER MADE A GIGANTIC PLACEMENT REQUEST MENTIONING HER NAME. IF THERE IS A WAY TO POSSIBLY INVESTIGATE HER IN AN EXPEDITIOUS MANNER TO SEE IF SHE WOULD BE SUITABLE – SHE HAS A STABLE HOME AND TWO OTHER DAUGHTERS – THAT CERTAINLY WOULD BE A GOOD CHOICE OTHER THAN JUST PLACING THEM IN ORANGEWOOD.

I KNOW THAT THE MOTHER DIDN'T WANT THAT TO [29] HAPPEN BECAUSE MY CLIENT KNOWS THE PERSON AND APPARENTLY GETS ALONG WITH THEM WELL. THAT'S THE SAME PROBLEM THAT SHE HAS WITH HECTOR. THAT'S THE SAME PROBLEM THAT SHE HAS WITH DR. HOWELL THAT DID THE ORIGINAL 730 EVALUATION WHO SAYS NEGATIVE THINGS TOWARDS HER, IS AUTOMATICALLY SUSPECT AND IS HAVING SOME SORT OF CONSPIRACY WITH MY CLIENT. BUT IT'S CERTAINLY A BETTER OPTION AND SEEMS TO BE AN AVAILABLE OPTION FOR PLACEMENT. HER NAME IS MICHELLE EDWARDS.

MS. BENDER: IF I COULD JUST ADD THAT WE SUGGEST THAT THE SOCIAL SERVICES CONSULT WITH THE MINORS' THERAPIST IMMEDIATELY BECAUSE THERE IS GOING TO BE SIGNIFICANT TRAUMA WITH THIS TRANSITION. AND NOT ONLY ARE WE DEALING WITH ALLEGATIONS OF SEXUAL ABUSE, BUT THERE ARE ALLEGATIONS OF PHYSICAL ABUSE ON THE FATHER'S PART IN THE FATHER'S HOME.

SO OUR CONCERN WITH PLACING THE CHILD WITH ANY RELATIVE THAT WOULD HAVE UNDUE INFLUENCE – THE COERCION, THE UNNECESSARY PERSUASION CAN GO BOTH WAYS. IT'S PROBABLY JUST MORE BENEFICIAL AT THIS POINT FOR THE COURT TO HAVE THE CHILDREN IN A MUTUAL SETTING,

AS TRAUMATIC AS IT IS GOING TO BE IF THE COURT – WELL, THE COURT HAS ALREADY STATED IT INTENDS TO DIRECT S.S.A. TO REMOVE THE CHILDREN.

THE COURT: I HAVE BEEN DOING THIS SINCE I THINK ABOUT 1990. THAT'S HOW LONG I HAVE BEEN ON THE BENCH. I DON'T THINK I HAVE EVER HAD TO ORDER SOCIAL SERVICES TO REMOVE A CHILD FROM A HOME BEFORE. THIS IS REMARKABLE BECAUSE WE WERE JUST HERE. I WARNED THE PARENTS WHAT WOULD [30] HAPPEN.

AND IT'S INTERESTING BECAUSE WHETHER OR NOT THE MOTHER KNEW OF THE COURT'S DECISION REGARDING WHETHER OR NOT MR. DELGADEO WAS AN APPROPRIATE MONITOR, IT'S INTERESTING TO NOTE TO THE COURT THAT ONCE THE MOTHER HAD MADE A DECISION AS TO WHETHER SHE LIKED MR. DELGADEO OR NOT, HER CHILDREN DECIDED THEY DIDN'T LIKE MR. DELGADEO. AND I NOTE THAT THE THINGS THAT THE CHILDREN SAY WHEN THEY ARE VILIFYING THE FOLKS THAT MOTHER DOESN'T LIKE ARE VERY CONCLUSIONARY AND THERE IS NO REAL DETAIL AS TO WHAT, EXACTLY, IT IS. THAT'S THE PROBLEM.

IN THIS PARTICULAR CASE WHEN THEY ARE TALKING ABOUT MR. DELGADEO,

[K.] SAYS THAT MR. DELGADEO THREATENED HIM, AND THEN WHEN HE IS ASKED WHAT WAS SAID, HE SAID, "WELL, COME ON. I WILL GO WITH YOU." NOW, THAT TELLS ME THAT YOU HAVE GOT A CHILD WHO HAS BEEN TOLD THAT SOMEBODY HAS THREATENED HIM WITHOUT KNOWING WHAT THREATENING MEANS.

WITHOUT REGARD TO WHETHER OR NOT THE CONDUCT BY THE FATHER HAD TAKEN PLACE OR NOT, THIS IS JUST NOT ACCEPTABLE. YOU ARE USING THESE CHILDREN, MA'AM. THERE IS NO QUESTION IN MY MIND, BASED ON WHAT I HAVE GOT RIGHT NOW BEFORE ME, THAT THAT'S WHAT'S GOING ON.

WE ARE GOING TO HAVE A TRIAL ON THE 28TH. AND IT MAY WELL BE THAT YOU ARE RIGHT AND YOU DIDN'T SAY THESE THINGS, BUT FROM THE EVIDENCE I HAVE BEFORE ME RIGHT NOW, [31] IT LOOKS LIKE YOU ARE. AND JUST AS AT THE DETENTION HEARING, I HAVE GOT TO BE LOOKING OUT FOR THE WELFARE OF THESE CHILDREN. I HAVE GOT TO DO THAT TODAY, TOO, BASED ON WHAT I HAVE BEFORE ME, RIGHT NOW. AS MUCH AS I DO NOT WANT TO REMOVE THESE CHILDREN FROM YOUR CARE, I THINK I HAVE NO OTHER CHOICE BUT TO DO THAT.

SO I AM GOING TO FIND THAT IT'S OF IMMEDIATE AND URGENT NECESSITY FOR THE

PROTECTION OF THESE CHILDREN THAT THEY BE REMOVED FORM YOUR HOME, AND I FIND THAT TO LEAVE THESE CHILDREN IN YOUR HOME AT THIS TIME WOULD CREATE A SUBSTANTIAL RISK OF EMOTIONAL AND PSYCHOLOGICAL DETRIMENT TO THESE CHILDREN. I AM ORDERING SOCIAL SERVICES AGENCY TO REMOVE THESE CHILDREN FROM THE HOME.

I AM ALSO GOING TO ORDER, MA'AM, THAT YOU NOT DISCUSS THIS IN ANY WAY. I DON'T CARE HOW IT COMES ABOUT, BUT YOU HAD BETTER NOT SAY A SINGLE WORD IN THE PRESENCE OF THESE CHILDREN ABOUT HOW THIS HAS TAKEN PLACE OR HOW THIS HAS COME ABOUT. AND IF YOU DO, I WILL FIND YOU IN CONTEMPT OF COURT AND I WILL PUT YOU IN JAIL.

DO YOU UNDERSTAND ME?

THE MOTHER: YES, SIR I DO UNDERSTAND YOU. I HAVE FOLLOWED YOUR INSTRUCTIONS, I ASSURE YOU. I RESPECTED THEM.

THE COURT: SO THE CHILDREN ARE TO BE REMOVED FORTHWITH. WE WILL HAVE THE CHILDREN DETAINED AT ORANGEWOOD – WELL, I WILL TELL YOU WHAT. YOU GO AHEAD AND [32] REMOVE THE CHILDREN AND WE WILL HAVE A DETENTION HEARING AS SOON AS YOU DO. IN FACT, I THINK YOU NEED A NEW PETITION. SOCIAL SERVICES WILL NEED TO

FILE A NEW PETITION THAT AMENDS IT TO MAKE THESE ALLEGATIONS AS WELL.

THE MOTHER: CAN THE NANNY BRING THE CHILDREN TO ORANGEWOOD CHILDREN'S HOME?

THE COURT: ARE THE CHILDREN WITH THE NANNY NOW?

MS. BENDER: YOUR HONOR, THE MINOR [K.] IS HOME ILL TODAY. THE MINOR [P.] IS IN HER SCHOOL SETTING.

THE COURT: WHO IS WITH [K.]?

MS. BENDER: THE GRANDMOTHER IS AT HOME WITH [K.].

THE COURT: I WOULD SUGGEST THAT THE WORKER GO OUT IMMEDIATELY AND PICK UP [K.] AND THEN PICK UP THE OTHER CHILD WHEN – WHAT TIME DOES THE OTHER CHILD COME HOME FROM SCHOOL?

MS. BENDER: 2:15, YOUR HONOR.

THE COURT: I SUGGEST THE WORKER GO THERE TO PICK UP THE CHILD WHEN THE CHILD GETS HOME.

MS. BENDER: WELL, YOUR HONOR, PERHAPS – COULDN'T WE AT LEAST COMMUNICATE WITH THE THERAPIST AND PERHAPS HAVE THE THERAPIST AVAILABLE?

UNFORTUNATELY, THIS WORKER IS, BRAND NEW.

THE COURT: I DON'T KNOW ANYTHING ABOUT THE THERAPIST. WHO HIRED THE THERAPIST?

MS. BENDER: YOUR HONOR, THIS THERAPIST HAS BEEN SEEING THESE CHILDREN FOR SEVERAL YEARS.

[33] THE COURT: WHO HIRED THE THERAPIST?

THE MOTHER: THE 730 EVALUATOR REQUESTED THAT A THERAPIST BE GIVEN TO THE CHILDREN. IT WAS AGREED UPON BY THE EVALUATOR.

THE COURT: WHO HIRED THE THERAPIST?

MS. BENDER: MRS. HARDWICK IS –

THE MOTHER: EXCUSE ME. MR. HARDWICK AND I BOTH HAVE GONE TO THE THERAPIST WITH THE CHILDREN.

THE COURT: IS THERE AN ANSWER TO MY QUESTION?

MS. BENDER: YOUR HONOR, APPARENTLY BOTH PARENTS SHARE THE COST OF THE THERAPIST.

THE COURT: WHO HIRED THE THERAPIST?

MS. BENDER: BOTH OF THE PARENTS DID, AS A RESULT –

THE COURT: BOTH PARENTS HIRED THE THERAPIST?

THE MOTHER: WE HAD TO BE IN AGREEMENT.

MS. CIANFRANI: I THINK THE THERAPIST IS APPROPRIATE AND SHE IS LOOKING OUT FOR THE CHILDREN'S BEST INTEREST. I THINK SHE CAN BE NEUTRAL, AS FAR AS I KNOW, SINCE OUR LAST DISCUSSION WITH HER ABOUT WHAT'S GOING ON IN HERE. SHE REALIZES THE CHILDREN ARE BEING PULLED APART BY THIS, AND I THINK IT MIGHT BE BEST IF SHE COULD GO OVER TO ORANGEWOOD OR WHEREVER THEY ARE PLACED.

THE COURT: WELL, THE ONLY THING THAT CONCERNS ME ABOUT IT IS YOU HAVE GOT THAT THERAPIST ALSO, WITH THE KNOWLEDGE THAT YOU HAVE INDICATED, SAYING THAT NOTHING SHOULD HAPPEN IN TERMS OF PROTECTING THE CHILDREN FROM THE [34] INFLUENCE THAT'S TAKING PLACE. SO I HAVE GOT SOME CONCERNS ABOUT THAT.

MS. CIANFRANI: I DON'T HAVE ANY DIRECT INFORMATION FROM THE THERAPIST AT THIS POINT. I COULD CALL.

THE COURT: I AM HEARING IT FROM MS. BENDER. SHE SAYS THAT THE THERAPIST IS TELLING HER THAT THE CHILDREN SHOULDN'T BE REMOVED.

MS. CIANFRANI: MAYBE IT'S BASED ON NOT WHAT HAPPENED IN COURT TODAY OR WHAT KNOWLEDGE THE COURT HAD, BUT BASED ON MOTHER'S RENDITION.

MS. BENDER: OBVIOUSLY, YOUR HONOR, I DON'T HAVE THE INFORMATION FROM MS. VREEKEN OR MS. WILKINS. WHEN I SPOKE TO MS. MITCHELL – SHE HAS BEEN TREATING THESE CHILDREN FOR A LENGTHY PERIOD OF TIME. SHE DOES APPEAR VERY NEUTRAL. AND I THINK THE CHILDREN DON'T KNOW MS. VREEKEN VERY WELL. THEY HAD A BETTER ASSOCIATION WITH MS. DAVIS.

THE MINOR [K.] HAS SPECIFIC MEDICAL CONDITIONS AS FAR AS BEING DIAGNOSED WITH AUTISM. AND THE CURRENT CONCERN IS THAT SHE IS GOING TO FREAK OUT IF MS. VREEKEN COMES TO TAKE THESE KIDS AWAY. I DON'T THINK SHE HAS ESTABLISHED A RELATIONSHIP THERE.

THE COURT: NO. THE AGENCY IS TO DO WHAT I TOLD THEM TO DO. IF YOU WANT TO HAVE THE THERAPIST AVAILABLE TO GO TO ORANGEWOOD AND TALK TO THE CHILDREN, THAT'S FINE. WE ARE NOT GOING TO DELAY THIS TO ACCOMMODATE THE THERAPIST. SO

THAT'S GOING TO BE DONE FORTHWITH. I WANT THE CHILDREN [35] OUT OF THE HOME.

ANYTHING ELSE?

MS. BENDER: I DON'T BELIEVE SO, YOUR HONOR.

MS. CIANFRANI: NO, YOUR HONOR.

THE COURT: WE WILL HEAR FURTHER FROM YOU REGARDING THIS WHEN WE HAVE THE DETENTION HEARING.

MS. BENDER: THANK YOU, YOUR HONOR.

MR. STAPLETON: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

TRIAL EXHIBIT NO. 40

Social Services Agency
Children And Family Services
301 The City Drive South
Orange, California 92868
Marcie Vreeken, Dependency Investigations
(714) 935-6027
V5EH
DSS No. 0D57376

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE – JUVENILE DIVISION
341 The City Drive South, Orange, California 92868

COURT REPORT ADDENDUM

Hearing Date	Hearing Time	Dept./Room	Hearing Type/ Subtype
04/03/2000	09:00am	L31	Trial

IN THE MATTER OF

Name	Date of Birth	Age	Sex	Court Number
[K.] Hardwick	09/19/1990	9	F	DP-002001
[P.] Hardwick	09/09/1993	6	F	DP-002002

SUMMARY RECOMMENDATION

Sustain Petition
Declare Dependency
Family Reunification Services to Parents

CHILDREN'S WHEREABOUTS

On March 21, 2000, the children were placed in the foster home of Cheryl and Sharon Gibson, telephone number (949) 713-5148. Prior to that, they were placed in Orangewood Children's Home. Prior to that, they were placed with their mother.

ADDITIONAL INFORMATION

On March 30, 2000, the undersigned spoke with Cheryl Gibson, the children's foster mother.

* * *

Ms. Gibson stated that [K.] talks about her fears of going to Orangewood Children's Home. [P.] teases her about this, which makes [K.] more fearful. [K.] stated that there were too many people at Orangewood Children's Home, and the kids had to wait in line to go to the bathroom. [K.] has expressed her fear of returning to Orangewood Children's Home numerous times. [K.] teases [P.], but it appears to be normal between the siblings. [K.] places the blame of being in foster care on the Court. [K.] will make excuses to avoid visiting with her dad. She will say that she misses too much school. [K.] became frustrated with her math homework and wanted to call her mother.

However, later decided not to. The children know they can call their mom or dad. They can recite the telephone numbers, but decline to call their parents. The children miss Rosie and her children.

Ms. Gibson stated that the children have exhibited sadness at times and after the session with Dr. Mitchell. While she and the children drove by the freeway exit near the children's home, [K.] waved at the house and said that she missed her mom. [K.] says that she wishes this could be over so she could return home.

The foster mother does not see these children decompensating. "They are taking each moment as it comes." Of course they look forward to returning home. When the mother calls, she speaks in a very sad tone, which brings the kids down. The children then become sad.

On March 31, 2000, at approximately 4:15 p.m. Senior Social Services Supervisor Helen Dwojak brought to the Court, a letter written by Dr. Mitchell, the children's therapist. This letter was faxed to the Social Services Manchester Office Building (see attachment).

Ms. Dwojak stated that Ms. Fogarty, who identified herself as the children's maternal grandmother, came to Manchester Office Building, 3rd floor at approximately 3:50 p.m., and contacted Aide Padilla the receptionist. Ms. Padilla stated that Ms. Fogarty told her that Senior Social Worker, Marcie Vreeken had sent her over to pick up papers that a doctor was

going to fax for the Hardwick case. Ms. Fogarty seemed to be in a hurry and said, "Marcie's at Court waiting for me." Ms. Padilla was hesitant to give the letter to Ms. Fogarty and contacted Supervisor Helen Dwojak. Ms. Fogarty also said she wanted custody of the children, because the psychologist said the children were going through trauma.

Senior Social Services Supervisor, Helen Dwojak, asked Ms. Fogarty who sent her to pick up the letter and Ms. Fogarty stated, "the Court, they need a fax that was sent to Marcie Vreeken." Ms. Dwojak did not give the letter to Ms. Fogarty, but took the letter and walked with Ms. Fogarty to Court. On the way to Court, Ms. Fogarty said that the attorneys had called Dr. Mitchell today and Dr. Mitchell was leaving town at 1:00 p.m. and would fax something over before she left.

Prior to March 31, 2000, at approximately 4:15 p.m., the undersigned was not aware that the document (letter from Dr. Mitchell) existed and at no time requested that Ms. Fogarty pick up the letter to bring to Court. The undersigned had no conversation with Ms. Fogarty on March 31, 2000. The undersigned was present in Court on March 31, 2000, and at no time did the Court request that Ms. Fogarty pick up a letter from the Social Services Agency.

On March 30, 2000, the undersigned received a telephone message from Dr. Mitchell, telephone number (562) 494-6726. Dr. Mitchell stated that she saw the children on Wednesday, March 29, 2000. The

children have a very nice foster mom and the children seem glad to be in a foster home setting. Dr. Mitchell said that [K.] seems to be shutting down. [K.] blames herself and expressed that "she never should have disclosed. Maybe he would never do it again. She should have kept her mouth shut." Dr. Mitchell expressed the concern that [K.] sobbed the entire time she was here and seems devastated. (see attachment).

The undersigned has not had an opportunity to talk with Dr. Mitchell about her fax letter dated March 31, 2000, as she is out of town.

On March 31, 2000, the undersigned spoke to Kathy O'Conner, school psychologist for Melinda Heights Elementary, telephone number (949)888-7311. Ms. O'Connor said that [K.] had adjusted well and has made friends in her class. Her concern was that the Special Education class consisted of 4th, 5th and 6th grade boys and if placed in that class, [K.] would be the only girl. Ms. O'Conner suggested that [K.] remain in her 4th grade class for half of the day with modified work and attend a Resource Special Program (RSP) with a very small group (varies from 2 to 5 children) for math and reading for the remainder of the day. Ms. O'Connor believes that the school can accommodate the child's academic needs. She proposes this schedule for 30 days and at the end of that time, the child's adjustment and progress will be evaluated.

On March 31, 2000, both parents were told of this proposal and given the name and number of the school psychologist.

Respectfully Submitted,

Larry M. Leaman, Director
Orange County Social Services Agency

By

/s/ Marcie Vreeken — 04/03/2000
Marcie Vreeken, — **Date**
Senior Social Worker,
V5EH, (714) 935-6027

/s/ Helen L. Dwojak — 04/03/2000
Helen L. Dwojak, — **Date**
Senior Social Services
Supervisor, (714) 935-6028

mz